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Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions

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ARTICLE

SHARED RESPONSIBILITY REGULATION MODEL FOR CROSS-BORDER REPRODUCTIVE TRANSACTIONS

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"The correct regulative principle for anything depends on the nature of that thing."[1]

INTRODUCTION

The term "cross-border reproductive transactions" refers to the movement of tens of thousands of people, who travel from one country to purchase reproductive services from suppliers in other countries, in order to have a child.[2] It is estimated that between eleven and fourteen thousand patients in Europe alone engage in this practice annually.[3] Historically, the phrase 'medical tourism' used to refer to the travel of patients from less-affluent countries seeking better healthcare in countries with superior healthcare standards. Today, the journey is just as likely to flow in the opposite direction, as patients travel from industrialized to less affluent countries seeking more affordable, high-quality treatment or alternative medicine. Globalization has changed the challenges involved in, and promises fueling, fertility services markets. In traditional surrogacy, the surrogate provided both an egg and a womb. With the advancement of technology, gestational surrogacy enables the transportation of 100 percent of the genetic material, which will determine the physical and bodily characteristics of the child, from anywhere in the world. Fertilized eggs can be transferred from anywhere in the world, and any healthy woman can carry the pregnancy to term, regardless of the child's genetic characteristics.

Patients often seek cross-border fertility treatment due to restrictions on reproductive options in their home state. Sometimes certain categories of patients are denied access to a particular service by law, usually due to political, religious, or ethical considerations, or even the need to allocate resources among medical treatments.[4] The collapse of barriers in the era of globalization has facilitated access to new, exterritorial suppliers of reproductive services, eggs, and womb services.[5] The ease of mobility, the

1. JOHN RAWLS, A THEORY OF JUSTICE 29 (1971).

2. For more definitions of the phenomenon, *see* Marcia C. Inhorn & Pasquale Patrizio, *Rethinking Reproductive "Tourism" as Reproductive "Exile"*, 92(3) FERTILITY AND STERILITY 904, 904 (2009); Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 337 (2002); Richard F. Storrow, *Quest for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L. J. 295, 300 (2006). *Cf.* Kerrie S. Howze, *Medical Tourism – Symptom or Cure?*, 41(3) GA. L. REV. 1013, 1014 (2007). The terms "medical tourism" and "health tourism" often refer to treatments that have been planned in advance to take place outside a patient's usual place of residence. A "medical tourist" is one who travels to a foreign country to consume medical services.

3. F. Shenfield et al., *Cross-border Reproductive Care in Six European Countries*, 25 HUM. REPROD. 1361, 1365 (2010).

4. John Tobin, *To Prohibit Or Permit: What Is The (Human) Rights Response To The Practice Of International Commercial Surrogacy?*, 63 INT'L & COMP. L.Q. 317, 319 (2014).

5. I have chosen to use a different term, "supplier," in order to emphasize the commercial, commodified, and industrial aspect of surrogacy and egg sale, and to avoid camouflaging commercialization in softer terms such as "donor" or "worker." While "provider" may be more idiomatically correct, it is used in the professional jargon to describe

availability of services, the quantity of information available online, and the possibility of sharing medical knowledge all make the process safer, more accessible, and easier to implement.

This Article analyzes the phenomenon of cross-border reproductive transactions specifically between consumers, i.e., aspiring parents from affluent countries and suppliers of reproductive services from lower-middle-income countries. Lower-middle-income countries, such as Romania in the case of egg sales, and India and Thailand in the case of surrogacy services appear to be attractive places to carry out such transactions. They provide cheap but high-standard private healthcare facilities for consumers from affluent countries, relatively short wait times, English-speaking providers, and tourist destinations.[6] In Thailand, at least thirty clinics provide full clinical services for assisted reproduction; though not all serve foreign patients, the number of foreign-friendly providers has been increasing since 2004, when the Thai government launched a deliberate strategy to encourage foreign medical travel to Thailand. The Thai medical tourism industry was estimated to be worth $4.3 billion USD in 2012.[7] The surrogacy industry in India is also booming. The advantages of cross-border reproductive markets are especially attractive to women who lack other sources of income. There are more than 600 In Vitro Fertilization (IVF) clinics in both rural and urban areas throughout India providing an estimated 60,000 assisted reproductive treatments a year.[8] The Akanksha clinic in Anand, for example, was reported to have employed 167 surrogates who have delivered 216 healthy babies since 2003.[9] The surrogacy industry was estimated to be worth $60 billion USD worldwide in 2008.[10] While the

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Health Maintenance Organizations ("HMOs") and other institutional actors, which provide health services to the public. We sometimes forget that surrogacy and egg sale are not just technological procedures provided by third parties, but involve another woman whose bodily labor is the "service." I am not sure that "supplier" faithfully represents their significant and meaningful role, but I have tried to differentiate it from providers of technological services. Accordingly, I use the term "consumers" for intended parents, except in relation to recognition of legal parenthood, for which I use "intended parents."

6. *See* Jyotsna Agnihotri Gupta, *Reproductive Biocrossings: Indian Egg Donors and Surrogates in the Globalized Fertility Market*, 5 Int'l J. Feminist Approaches to Bioethics 25, 32 (2012) (pulling factors to India); Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, The Kenan Institute for Ethics at Duke University 1, 3 (2014), http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf.

7. Churnrurtai Kanchanachitra et al., *Human Resources for Health in Southeast Asia: Shortages, Distributional Challenges, and International Trade in Health Services*, 377 Lancet 769, 775 (2011).

8. Center for Social Research, Surrogate Motherhood – Ethical or Commercial 23 (2012), http://www.womenleadership.in/Csr/SurrogacyReport.pdf [hereinafter Center for Social Research]; Neeta Lal, *Risks Flagged in India's Fertility Tourism*, Asia Times Online, (Aug. 1, 2012), http://www.atimes.com/atimes/South_Asia/NH01Df01.html.

9. Frances Winddance Twine, Outsourcing the Womb: Race, Class and Gestational Surrogacy in a Global Market 17 (2011).

10. Andrea Whittaker, *Cross-Border Assisted Reproduction Care in Asia: Implications for Access, Equity and Regulations*, 19 Reprod. Health Matters 107, 107 (2011). India and Thailand are major hubs for international assisted reproductive care, although Singapore, Malaysia and South Korea are increasingly important as destinations. *Id.* at 108. On

exact size of the medical tourist population is unknown, anecdotal evidence places it in the hundreds of thousands to several millions yearly.[11] These markets pose new challenges, demanding a reexamination of global concepts of justice and responsibility to fit new, modern needs. Ultimately offering a model for comprehensive regulation, this paper considers which parties should bear responsibility to ensure proper conduct of the market, and proper conduct in regards to suppliers of reproductive transactions, egg sellers and surrogates in particular.

Markets in fertility services can be described, according to Iris Marion Young, as "structural injustice", defined as "social processes [that] put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities."[12] Fertility transactions often reflect socioeconomic disparities between suppliers and consumers. This inequality is highlighted by many feminist critics, who argue that reproductive markets reinforce the traditional hierarchical gendered division of labor based on gender stereotypes. It strengthens the perception of women as socially inferior to men, and turns women's labor into something that is used and controlled by others.[13] Gendered inequality is aggravated by the structural injustice between consumers from affluent countries and suppliers from lower-middle-income countries. The current situation reflects a lack of economic power of women suppliers of reproductive services and results in the infringement of their rights. Structural injustice cannot be understood in light of private transactions alone, but must be understood as part of a systemic practice—an entire industry that relies on women living in circumstances of social inequality.

The need to remedy structural injustice is clear. To date, proposals for regulation have been sparse. Most have focused on the interests of children and aspiring parents, and are insufficiently attentive to the interests

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cross-border reproductive transactions as an industry, *see generally* Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, 12 INT'L SURROGACY ARRANGEMENTS 439, 444 (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter INT'L SURROGACY ARRANGEMENTS] (discussing cross-border reproductive transactions as an industry including commercial surrogacy in India).

11. Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MANAGEMENT & HEALTHCARE POL'Y 111 (2015).

12. Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y, 102, 114 (2006).

13. DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE 117, 127-132 (2010). *See also* Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1211 (1995); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 14 (1996) ("Often they [reproductive technologies] treat the woman as a reproductive vessel to produce or serve the interests of males and the state in healthy offspring.").

of suppliers of fertility services. Moreover, such proposed reforms are often abstract and difficult to implement, as they merely recommend international regulation or unilateral action, both of which, this paper argues, seem insufficient.

No universal expression of reproductive justice currently exists. Drafting universal rules might be difficult, especially with regard to the issues of reproduction, family, and parenthood, which are personal, social, and cultural issues and thus vary widely from state to state.[14] Moreover, universal regulation of cross-border reproductive transactions would probably be more attractive to states that accept some sort of commercialization of reproductive services, even if with heavy restrictions. Politically, it would be hard for countries that nationally completely ban the supply of reproductive services to regulate a cross-border market that they consider intrinsically unethical.[15] These countries would find it difficult to collaborate with any international norm that does not condemn the procedure. Other countries could agree on a general understanding regarding relevant human rights, such as requirements of proper medical standards and the demand for informed consent, but it remains unclear whether this common ground could meaningfully extend the principles of reproductive justice above a minimal human rights threshold. This reality reflects a lack of consensus in a pluralistic world.

In light of the right to sovereign self-determination to regulate according to national values,[16] I will first consider the independent responsibilities of states. Strong concerns regarding the morality of consumers' states' policies arise when their reproductive policy in the domestic sphere is inconsistent with their policy in the international sphere. Many countries ban or restrict the commercial provision of reproductive services in their territory, yet, when their citizens buy these services across the border, these states' laws and policies approve of market transactions that would be considered illegitimate domestically by acknowledging parent-child relations and granting entry visas or citizenship to the resulting child. I will argue that a national-international consistency model, which requires consistency between each state's domestic and global policies, could be sufficient to overcome this moral problem. Yet, as will be shown, even if states' policies exhibit such consistency, unilateral action on their part is insufficient to ensure coherent ethical regulation, to guarantee a proper way of conduct, or to sufficiently protect the suppliers of reproductive services. It may imply good intentions on the part of states, but it will not remedy the negative implications of cross-border reproductive markets. Since unilat-

14. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 79 (1983).

15. Tobin, *supra* note 4, at 344.

16. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 296 (2013). For more on the pursuit of national interest as a moral duty as well as political necessity, *see* Hans J. Morgenthau, *The Mainsprings of American Foreign Policy: The National Interest vs. Moral Abstractions*, 44 AM. POL. SCI. REV. 833, 854 (1950).

eral action is insufficient, I propose what I believe is a transformative model for regulating cross-border reproductive transactions through shared responsibility.

This paper proposes an applicable shared responsibility model for regulation, based on the model suggested by Young and Barry that makes it possible to assign duties to all involved according to measures of each party's entanglement in the unjust structure and their ability to remedy it.[17] This is arguably the first model that is attentive to all aspects of the phenomenon and that offers a multileveled system of regulation, including unilateral, transnational and international aspects, as well as new collaborations between actors. It suggests some remedies for exploitative transactions, but also aims to correct the structure of injustice that sustains the inequalities present in cross-border markets.

I will outline the parameters of the shared responsibility structure, including engaging and assigning parameters. Engaging parameters determine who the responsible actors are, and the extent to which they have contributed to bringing about an unjust situation. Assigning parameters delegate actors different kinds of duties based on the way each actor is connected to the others, the power relations among different positions, and the areas where actors have the capacity to change. My research identifies four focal points for addressing cross-border reproductive transactions in order to minimize the negative impacts on consumers, suppliers, resulting children, and their states: (1) joint action regarding legal parenthood and the nationality of the child, (2) ensuring universal norms of proper medical standards, (3) contractually avoiding violation of women's and children's rights and ensuring more equitable division of the benefits from these transactions, and, (4) a general global commitment to the reduction of poverty through the empowerment and capacity building of the poor.

In order to see whether a unilateral action of a consumer state could cure some of the wrongs in cross-border reproductive transactions, the article first examines the sufficiency of unilateral action. The second part elaborates on the regulative mechanism of a shared responsibility model. The third part specifies what action each actor would be expected to take as part of the joint action in order to comply with the recommendations and promote more desirable transactions. The paper then reviews these recommendations in light of an Israeli case study.

I. National Morality – National-International Consistency Model

Under the current legal situation, consumer countries are exempt from any legal obligation toward foreign suppliers. Strong concerns regarding a double standard arise when a consumers' states' domestic policy

17. Christian Barry, *Global Justice: Aims, Arrangements, and Responsibilities*, *in* Can Institutions Have Responsibilities? Collective Moral Agency and International Relations 218 (Toni Erskine ed., 2004); Young, *supra* note 12.

regarding reproductive transactions is inconsistent with their policy regarding such transactions in the international sphere. States have the freedom to choose reproductive policies that express the price society is willing (or unwilling) to pay in exchange for having children through cross-border transactions, in accordance with their national moral and political values. National policies are traditionally applied within the context of the territorial state and limited to this territory. States are free to have different, independent policies, not necessarily compatible with the norms of other states, free from any moral judgment of the international community on their choice to support or not support commercial provision of reproductive services.[18] In the absence of international regulation regarding fertility treatments, states are neither subject to international schemes of regulation, nor committed to ensuring that their own domestic norms regulating the subject are nationally and internationally consistent.

Moral considerations for global and domestic transactions for reproductive services bear strong similarities. Both solve the problem of the same consumer, using the same practice, with the help of either a local or foreign supplier. Ethically, unless we can justify a moral difference between the national and international contexts, some consistency should be maintained between the national and international definitions of proper conduct. Many national justifications for restricting eligibility for reproductive services should be relevant when transactions cross borders. For example, if the reason that reproductive transactions are restricted is that certain transactions are wrong or immoral, then since the underlying subject of the transaction is the same, the moral evaluation should be the same: the act would be judged immoral whether the supplier is local or foreign. If the reason for restricting eligibility is to protect domestic suppliers from potential exploitation or violation of human rights, then in order to deny foreign suppliers their entitlement to the same rights, we must show that differences between the domestic and international contexts demand different standards. Unless the mere existence of a border justifies different ethical values, it is hard to imagine how moral considerations regarding cross-border reproductive transactions might change.

However, not all legislation expresses national-international normative consistency. On the contrary, many countries ban or restrict the commercial provision of reproductive services in their territory, yet when their citizens buy these services across the border, these states' laws and policies approve of market transactions (that would be considered illegitimate domestically) by acknowledging parent-child relations and granting entry visas or citizenship to the resulting child.[19] For example, in spite of the domestic ban on commercial surrogacy in the UK, since a court-approved "parental order" is required, in practice courts have recognized the parenthood of consumers who paid "significant" amounts for a commer-

18. John Charvet & Elisa Kaczynska-Nay, The Liberal Project and Human Rights: The Theory and Practice of a New World Order 59 (2008).

19. Int'l Surrogacy Arrangements, *supra* note 9, at 514-18.

cial surrogacy (that are illegal in the UK) in at least in two cases (where surrogacy took place in the Ukraine and in California).[20] Germany, France, Holland, and New Zealand demonstrate a similar inconsistency by nationally restricting or banning commercial surrogacy,[21] but accepting the results of cross-border reproductive transactions through acknowledgement of the legal parenthood and nationality of the resulting children.[22]

The same is true with the sale of eggs. The Italian government stated that the reasons for enacting the ban on donor gametes are to affirm that heterosexual couples are the only appropriate type of family formation and that it fears harm to the children and society if homosexual families were condoned.[23] Based on this reasoning, the Italian government should have an interest in preventing such transactions across the border as well, or at least in reducing them, as this moral interdiction does not change whether the child is a result of a domestic or foreign gamete. Nevertheless, in spite of potential "harms to the children and society," the law does not impose any difficulties on couples who purchase a foreign third-party gamete.

While consumers' countries may not take responsibility for private transactions that their citizens make overseas, their policies affect the market. According to Eyal Benvenisti's model, when deciding whether to allow the supply of reproductive services domestically, states have a duty to weigh the interests of foreign stakeholders if it is within their power to do so.[24] How should they do it?

First, they should respect, to some extent, the principle of proportionality in policymaking. Consumers' states should do everything in their

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20. Human Fertilisation and Embryology Act 2008, c. 22, § 54(8) (Eng.) enables courts to consider whether no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants when authorizing a parental order. *See* Denis Campbell, *Couples Who Pay Surrogate Mothers Could Lose Right to Raise the Child*, THE GUARDIAN (Apr. 5, 2010), http://www.guardian.co.uk/uk/2010/apr/05/surrogacy-parents-ivf.

21. For Germany, *see* Embryonenschutzgesetz [ESchG] [The Embryo Protection Act] Dec. 13, 1990 art. 1(1) No.1 & 2 (Ger.); For the Netherlands, *see* arts. 151b, 273f, Wetboek van Strafrecht (Sr.); For New Zealand, *see* Human Assisted Reproductive Technology Act 2004, s 14, sub 3 (N.Z.); For France, *see* Loi 94-653 du 29 July 1994 de Code Penal [Law 94-653 of July 29, 1994 of Penal Code] art. 227-12, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 19, 2000.

22. For acknowledgement of parenthood in spite of the public policy, in Germany *see* Susann L Gossl, *Germany*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 9, 131, 140; in the Netherlands *see* Ian Curry-Sumner & Machteld Vonk, *The Netherlands*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 9, 273, 287; in New Zealand, *see* Claire Achmad, *New Zealand*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 9, 295, 307-308; in France *see* Louis Perreau-Saussine & Nicolas Sauvage, *France*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS, *supra* note 9, 119, 122.

23. Storrow, *supra* note 2, at 306-07.

24. Benvenisti, *supra* note 16, at 297.

power to avoid passing on negative externalities to other countries.[25] Not every self-interested action is equally socially acceptable to the pantheon of nations, and not every domestic policy is proportional. Proportionality places limits on legislative power, requiring that laws addressing matters of great human importance—like reproduction—be carefully considered and that the least intrusive means for achieving the objective be used.[26] This duty obliges states to be attentive to interests of foreigners as well, and express those interests within policies. Regarding domestic transactions, a state may legitimately decide to ban all forms of assisted reproduction, but once it permits some forms, it should do so on a nondiscriminatory basis. In cases where some groups are allowed service and others are denied, the principle of proportionality may be good justification with which to demand equality under the national provision, since national provision could be better controlled when nationally regulated and would reduce cross-border transactions and the concerns of exploitation.[27]

Alternatively, states may be required to consider the eligibility of citizens for adoption arrangements, or at least to provide incentives and information regarding adoption similar to what they offer regarding medical options that may encourage social parenthood through adoption rather than biological measures requiring eggs and/or surrogacy services.[28] Providing medical solutions but not social ones may incentivize couples to pursue a path that cannot be considered the "least intrusive means" possible to achieve parenthood.

Consumers' states have a further opportunity to influence demand in the market when deciding if and how to recognize the consequences of cross-border reproductive transactions. In order to satisfy the ethical demand for consistency, states could ensure that the transactions made by

25. On proportional measures according to state policy, *see id.* at 542 (mentioning that in making this assessment, courts consider various factors such as the importance of the legislation to the state, the prevalence of similar laws in other jurisdictions, the likelihood of conflict with other states' laws, and the extent of the connections between the offence, the parties responsible for the offence, and the regulating state); Tobin, *supra* note 4, at 325.

26. On proportionality, *see* Richard F. Storrow, Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-Border Reproductive Travel, 23 REPROD. BIOMED. ONLINE 538, 540 (2011).

27. *See, e.g.*, S.H. and Others v. Austria, 2011-v Eur. Ct .H.R. 297, 328 (2010) (recognizing a similar conclusion when a petition against Austria challenged the ban on any use of gamete donations for IVF. The purpose of the ban was to prevent the exploitation of egg providers and the discriminatory selection of embryos based on genetic traits. Balancing these interests against competing interests, the European Court of Human Rights ruled that although the motivation for this prohibition was, among other things, the protection of egg suppliers, the decision should be subject to developments which the legislature would have to take into account in the future, or else it would be disproportionate.); Pennings, *supra* note 2, at 338 (offering to abolish all forms of restrictive and coercive legislation as the easiest way to minimize the travel out of the country); Tobin, *supra* note 4, at 349.

28. *See, e.g.,* Peter J Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL., POL'Y & L. 1215, 1232 (1997) (suggesting that adoption and incentives that drive people to use medical options rather than pursue social parenthood should be reconsidered).

their citizens are consistent with their domestic (proportional) normative commitments and derive from their own domestic political morality. Whatever values a state chooses to adopt through national law, believing them to be normatively preferable, should be reflected in its citizens' conduct in the global sphere. If the state bans markets in reproductive services, it should refuse to acknowledge transactions that its citizens make with foreign suppliers; if surrogacy arrangements are domestically justified only under certain conditions and standards, the approval of foreign transactions should be limited only to transactions that follow those standards.[29]

Before evaluating whether this is indeed a desirable model, I will consider the legal tools needed for the execution of this idea.[30] As a unilateral step, there are two legal tools that could express the commitment of consumers' states to their national values and standards in a consistent way: criminalizing actions they disapprove of and conditioning the registration of children on transactions being made under satisfactory standards. I will argue that these unilateral tools are insufficient on their own to remedy structural injustice.

1. Criminalization and Extraterritoriality

Societies sometimes ban the sale of goods whose supply they wish to discourage, even if the market could be an efficient instrument for the distribution of these goods.[31] Some states nationally criminalize different aspects of egg donation or surrogacy. Laws sometimes criminalize consumers for purchasing these services (for example, France and New Zealand),[32] impose civil liability, or criminalize actions taken by physicians or mediators who assist or advise patients (for example, France, Germany and South Africa).[33] According to the rationale of consistency (see *supra*, Section I), a state that bans an act domestically would be required to criminalize the same act performed across the border.

Extraterritoriality permits a state to prosecute its citizens for activities undertaken overseas. It may do so under the protective or security principle, the passive personality principle, or the nationality principle.[34] Nevertheless, it is doubtful whether reproduction-related issues can be justified as subjects of extraterritoriality. According to the protective principle (or the objective territorial principle), a state may criminalize acts committed abroad by a foreigner whose actions overseas have deleterious conse-

29. *See infra* Conditional Recognition, Section I.2.

30. For advantages and disadvantages, see *infra*, sec. I.3.

31. SATZ, *supra* note 13, at 189.

32. *See* CODE PÉNAL [C. PÉN] [PENAL CODE] art. 227-12 (Fr.); For New Zealand, *see* Human Assisted Reproductive Technology Act 2004, s 14(3) (N.Z.).

33. INT'L SURROGACY ARRANGEMENTS, *supra* note 9, at 464; Storrow, *supra* note 26, at 539.

34. *See* Ian Brownlie & Kathleen Baker, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 457-64 (James Crawford, 5th ed. 1998) (elaborating on the extraterritoriality principle).

quences within the state.[35] It is hard to justify criminalization of reproductive transactions on the basis of state security, but harmful effects domestically may be considered. However, as long as the categorical harms of these reproductive procedures are debatable, and there is a potentially acceptable way to perform these practices, there is no moral ground for the radical application of the extraterritorial protective principle.[36] The second principle, the passive personality principle, is used to assert jurisdiction over persons who harm a state's nationals living abroad.[37] The passive personality crime is irrelevant since no crime is committed against consumers. If anything, it is consumers who are fueling the market in which the offenses are occurring.

However, the third principle, the nationality principle (or active personality principle) prescribes jurisdiction based on the nationality of the actor and could be applicable to reproductive issues. This method is already being used to condemn severe behavior of citizens especially against foreign children,[38] and could be used in countries where commercial reproduction seems extremely immoral. For example, in 2010, Item 231 of the Turkish Penal Code was instituted, banning cross-border transactions involving third-party donation of sperm or eggs, on the grounds that it is illegal to "change or obscure a child's ancestry."[39] Turkey consistently applies this morality wherever Turkish citizens make use of a third party's gamete, nationally or internationally, and criminalizes citizens who acquire gametes, as well as mediators, physicians and donors who assist Turkish reproductive travelers.[40] Two Australian states, New South Wales[41] and Queensland,[42] have also criminalized resident involvement in any commercial surrogacy arrangements, including overseas activity, reflecting a consistency with state laws that only allow altruistic surrogacy.[43]

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35. Storrow, *supra* note 25, at 542.

36. Wannes Van Hoof & Guido Pennings, *Extraterritoriality for Cross-Border Reproductive Care: Should States Act Against Citizens Travelling Abroad for Illegal Infertility Treatment?*, 23 REPROD. BIOMED. ONLINE 546, 551 (2011).

37. Storrow, *supra* note 26, at 542.

38. The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, in an effort to fight child sex tourism; or the Convention on the Elimination of All Forms of Discrimination Against Women, with regard to extraterritorial crimes in many states.

39. Whittaker, *supra* note 10, at 113.

40. Bulent Urman & Kayhan Yakin, *New Turkish Legislation on Assisted Reproductive Techniques and Centres: A Step in the Right Direction?*, 21 REPROD. BIOMED. ONLINE 729, 730 (2010).

41. *Surrogacy Act 2010* (NSW) S 11 (Austl.).

42. *Queensland Surrogacy Act 2010* (Qld) S 54 (Austl.).

43. Jenni Millbank, *The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?*, 35 MELBOURNE UNIV. L. REV. 165, 185-86 (2011); Richard F. Storrow, *The Proportionality Problem in Cross-Border Reproductive Care*, *in* THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL ISSUES 129-30 (Cohen, I. Glenn ed., 2013). *See also infra*, the Israeli Bill, sec. III.4.

There are a few problems with the nationality principle. First, some states limit the extraterritorial criminal laws only to specific crimes such as homicide, sedition, or treason.[44] Second, it usually requires double criminality, meaning that the offense has to also be an offense in the foreign jurisdiction.[45] But destination states, being chosen for their permissive regulation of the supply to foreign consumers, are exactly those states that do not ban the industry. Thus, it is harder to justify interventions that conflict with the sovereignty of the destination country in which such activities are legal.[46] Third, enforcement of offenses such as the purchase of eggs abroad is almost impossible, since proving the offense was committed would require a physical inspection of pregnancy or invasive procedures upon the return of consumers to their country.[47] Such inspections violate citizens' bodily rights, their reproductive health rights, and their privacy rights. Preventing travel has been suggested as an alternative to criminalizing the transaction. However, it seems to disproportionately violate the freedom of movement and faces practical enforcement difficulties.[48] It is doubtful whether the state can justify restricting the travel of citizens to privately purchase reproductive technologies in other countries, especially where it is legal. Considering that this is a private decision regarding the personal family sphere and that their right to reproduce is not fulfilled within the state, consumers are entitled to privately decide on these matters.[49] The criminalization of consumers might further socially exclude the

44. Storrow, *supra* note 26, at 542; UNITED KINGDOM HOUSE OF COMMONS SCIENCE AND TECHNOLOGY COMMITTEE, HUMAN REPRODUCTIVE TECHNOLOGIES AND THE LAW, 2004-5 HC 5-1, ¶ 383 (UK).

45. Storrow, *supra* note 26, at 542.

46. Glenn I. Cohen, *How to Regulate Medical Tourism (and Why it Matters for Bioethics)*, 12 DEV. WORLD BIOETHICS 9, 20 (2012) [hereinafter Cohen, *How to Regulate Medical Tourism*]; Van Hoof & Pennings, *supra* note 36, at 550.

47. *Cf.* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 458 (1992) (discussing the case of the guarded German border and forced gynecological examinations upon women reentering Germany at the Dutch border in search of evidence of extraterritorial abortions, and the bringing of criminal charges against women who obtained abortions in other countries). The European parliament condemned these practices in 1991. *Id.* at n.23.

48. Van Hoof & Pennings, *supra* note 36, at 551. *See also* Rick Lawson, *The Irish Abortion Cases: European Limits to National Sovereignty*, 1 EUR. J. HEALTH L. 167, 175 (1994) (reporting a case in which an Irish 14-year old rape victim was restrained from leaving Ireland for nine months in order to prevent her from obtaining an abortion in Great Britain in 1992. This injunction was later overturned, with the statement that the restraint imposed on the applicants was disproportionate to the aims pursued, and that the freedom to obtain and make available information relating to services lawfully available in another state could not be restricted. It hasn't changed the ban on abortion.).

49. Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT'L L. 1, 47-48 (2011) [hereinafter Cohen, *Medical Tourism and Global Justice*] (arguing that when people pay out-of-pocket for medical (not reproductive) services, for the state to restrict them from doing so appears less convincing, especially if this is their only way to get the service). I think that cross-border reproductive transactions, which involve another person, rather than simply medical devices, raise different considerations regarding the interven-

infertile, adding criminal stigma to their suffering and causing further protest on behalf of consumers.[50]

Instead of criminalizing consumers, we might consider criminalizing the professionals who assist consumers, or criminalizing the mediators who perform certain procedures domestically. But this would also be hard to justify. Practically, physicians from consumers' countries sometimes perform the procedures in destination countries, as we learned in 2009, when Romania charged several Israeli professionals with engaging in the egg trade after buying human eggs from local women and implanting them in Israeli women. In this example, the physicians' actions were in violation of Romanian law that prohibits payment for human ova and organs, therefore the destination country (Romania) pressed charges, not Israel.[51] Organ trade is serious enough and would probably be an offense even in destination states that have permissive regulation. However, when certain acts are considered lawful in the destination state, or if doctors do not perform the procedure themselves but merely recommend the option to consumers, extraterritorial criminalization of physicians would be unjustifiable.

The criminalization of mediators imposes the risk that such practices might appear in the black market, which would worsen the position of suppliers due to lower standards and the lack of monitoring. Moreover, the mediators are not necessarily within consumers' states' jurisdiction. Many foreign mediators work online outside the scope of consumers' states' jurisdiction and may act in accordance with their own domestic laws. Eventually, scholars argue, all attempts to impose criminal prohibitions are doomed to fail and are mainly symbolic.[52]

2. Conditional Recognition

Lack of harmonization between countries with regard to the registration of the legal parenthood and nationality of the child raises administrative opportunities for consumers, but also difficulties. Conditional registration as a legal monitoring tool relates specifically to surrogacy transactions, rather than to egg sale, since it occurs when intended parents return to their home country with a new baby. Nationally, all states have citizenship laws, which as a default acknowledge the citizenship of their

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tion of states, which change the normative conclusion, although criminalization certainly is not the best method.

50. Whittaker, *supra* note 10, at 113.

51. Michal Nahman, *Reverse Traffic: Intersecting Inequalities in Human Egg Donation*, 23 Reprod. BioMed. Online 626, 629 (2011).

52. *Compare* Int'l Surrogacy Arrangements, *supra* note 10, at 442 *with* United Nations Development Policy (UNDP) Global Commission on HIV and the Law: Risks, Rights and Health 7 (2012), http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf (stating that the approach to tackling HIV, condemning the use of punitive laws and instead encouraging the promotion of human rights).

citizens' offspring.[53] However, most countries, including many destination countries, grant parenthood to the woman who gives birth.[54] In these cases, the legal parenthood of intended parents must either be acquired when they return to their home country, or is established in the state of birth and then confirmed by the consumers' state.[55] When such transactions are inconsistent with national policies, states can either impose difficulties on returning citizens by refusing to issue a passport or visa to the child, or grant citizenship. Problems may arise when the child needs traveling documents and the legal parenthood of the intended parents is yet to be determined,[56] or when the consumers' state refuses to recognize a foreign legal action relinquishing the surrogate of her parental rights in destination countries (a birth certificate or court order regarding the legal parents).[57] Yet, many states that ban or restrict commercial surrogacy choose to recognize the outcomes of cross-border transactions, even when they are inconsistent with domestic policies regarding commercial surrogacy. They settle for some proof of the genetic connection between the resulting child and at least one of the intended parents.[58]

Conditional registration can be used to enable consumers' countries to efficiently monitor the contracts. The state's role in acknowledging legal parenthood or nationality can ensure that children born through surrogate contracts are only registered if these contracts are sufficiently in accordance with national values and standards. In line with the national-international consistency demand, this is only an option for states that enable the provision of eggs or surrogacy services domestically.

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53. For different methods of regulating nationality, *see* PERMANENT BUREAU, A PRELIMINARY REPORT ON THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS 22, 24 (2012), http://www.hcch.net/upload/wop/gap2012pd10en.pdf. For different methods of regulating parentage determination, *see id.* at 20; Karen Busby, *Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere*, 25 CAN. J. WOMEN & L. REVUE FEMMES ET DROIT 284 (2013).

54. For exceptions, *see* El Codigo Civil de Tabasco [CCiv] [Civil Code] art. 347 (Mex.); Ukraine. The family code of Ukraine art. 123(2) (Ukr.) (intended mother is considered to be the legal mother).

55. INT'L SURROGACY ARRANGEMENTS, *supra* note 10, at 503-504, 510.

56. Richard F. Storrow, *Travel into the Future of Reproductive Technology*, 79 UMKC L. REV. 295, 305-06 (2010) ("Citizens of several European and Asian countries, including the United Kingdom, France, Germany, Spain, Belgium, and Japan have been refused travel documents for their children by consular officials upon suspicion that the children were the result of international commercial surrogacy."); INT'L SURROGACY ARRANGEMENTS, *supra* note 10, at 506-09.

57. Storrow, *supra* note 26, at 543. *See, e.g.* Gerd Verschelden & Jinske Verhellen, *Belgium*, *in* INT'L SURROGACY ARRANGEMENTS 49, *supra* note 10, at 68-69; Louis Perreau-Saussine & Nicolas Sauvage, *France*, *in* INT'L SURROGACY ARRANGEMENTS 122, *supra* note 10, at 122-23; Marcelo de Alcantara, *Japan*, *in* INTERNATIONAL SURROGACY ARRANGEMENTS 247, *supra* note 10, at 250-51; Ian Curry-Sumner and Machteld Vonk, *The Netherlands*, *in* INT'L SURROGACY ARRANGEMENTS 273, *supra* note 10, at 292-93.

58. INT'L SURROGACY ARRANGEMENTS, *supra* note 10, at 514-18.

Indeed, several cases have challenged patterns of kinship and status in the cross-border context.[59] A representative case is that of the baby Manji (2008). It involved Japanese parents transacting in India. According to Indian law, a birth certificate requires the names of both mother and father. In Manji's case, a month before the baby was born, the intended parents, the Yamadas, divorced. The courts have been unable to make a clear statement regarding who is to be deemed the baby's mother, because the contract was not legally binding with regard to parental responsibilities.[60] Yamada's ex-wife (the intended mother) refused to travel with him to take possession of Manji. The anonymous egg donor (the genetic mother) had neither rights nor responsibilities toward the baby. The responsibility of Mehta (the gestational mother) ended when the baby was born, after she had relinquished her rights. Eventually, the Rajasthan regional passport office issued Manji an identity certificate as part of a transit document. The certificate did not mention nationality, mother's name or religion, and it was valid only for the travel to Japan. It was the first such identity certificate issued by the Indian government to a surrogate child born in India. Japanese authorities stated that Manji could become a Japanese citizen "once a parent-child relationship has been established, either by the man recognizing his paternity or through him adopting her."[61] In spite of his genetic ties to her father, at this time there is still no evidence regarding the legal recognition of baby Manji's status by the state.[62]

The lesson to be learned from the Manji case is that the conditional registration tool is no less problematic than criminalization. First, since in many cases of cross-border transactions the fathers are genetically connected to the children, it would be hard to justify not acknowledging parent-child relationships even if the surrogacy was unethical, especially in countries in which the parenthood of the father is genetically grounded.[63] Genetic connection, which is the common grounds for granting a parental order, is independent of the ethical or legal consideration regarding the procedure.

Second, conditional registration could end in infringement of the child's rights. States must ensure that their national law is in accordance with their obligations according to the human rights regime. As part of the Convention on the Rights of the Child,[64] any child has a right to be regis-

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59. *See, e.g.*, Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 39 CUMB. L. REV. 15, 62-67 (2008).

60. Points, *supra* note 6, at 5-7.

61. *Id.* at 6-7 ("[N]early a year after her birth, no evidence had surfaced that Baby Manji's legal status in Japan had changed.").

62. Trisha A. Wolf, Comment, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL'Y J. 461, 475 (2014).

63. In many states, intended fathers are acknowledged on genetic grounds. Trimmings & Beaumont, *supra* note 10, at 506-07, 519. Often in these countries the intended mother has to adopt because the registered mother in the birth certificate is the surrogate.

64. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. [hereinafter Convention on the Rights of the Child].

tered immediately after birth (art. 7), to preserve his or her identity, including nationality, name and family relations as recognized by law, without unlawful interference (art. 8), to enter their own country with his or her parents (art. 10), and not to be subjected to arbitrary or unlawful interference with his or her privacy and family (art. 16). The Convention on the Reduction of Statelessness states that a Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State (art. 4).[65] According to this convention, a state may refuse to register a child who is registered in the destination country or in another country. Such a refusal will not leave the child stateless, and will not necessarily be considered a violation of human rights.[66] However, when the citizenship laws in destination states do not grant citizenship to the child (e.g., in Russia), a refusal by consumers' countries to register the child might violate the child's right to citizenship. Aside from all the above mentioned considerations, refusing to register children born out of cross-border surrogacy transactions would discriminate against these children compared to other genetically connected children, which is a violation of the convention on the Rights of the Child, and a disproportionally harsh response.[67]

To conclude, the underlying purpose behind conditional registration is usually deterrence—to prevent future traveling. However, it is doubtful that this purpose could be achieved through conditional registration, since usually the international obligation to secure the rights and interests of a particular child[68] outweighs public policy considerations and strict safety rules.[69] Ultimately, many cases that were put to this test resulted in states allowing registration in spite of procedures that did not align with their own values, and/or regardless of the ethical considerations concerning the

65. Convention on the Reduction of Statelessness art. 4, Aug. 30, 1961, 989 U.N.T.S. 175.

66. Yasmine Ergas, *Thinking 'Through' Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy*, *in* INT'L SURROGACY ARRANGEMENTS, *supra* note 10, at 430-31. See, e.g., Cour de cassation [Cass.] [supreme court for judicial matters] (Arret Mennesson) 1re civ., Apr. 6, 2011, Bull. civ. I, No. 370 (Fr.) Twins were brought from California by their French parents. The transcription of their birth certificates had been initially allowed but subsequently annulled. Since the French provision did not cancel the Californian recognition of the children's filiation nor prohibit them from living with the intended parents, it was not considered a violation of their family rights, or against their best interests.

67. Convention on the Rights of the Child, *supra* note 64, art. 2.

68. *Id.* art. 3. *See* Millbank, *supra* note 43, at 197 (doubting whether the categorical exclusion of children born through paid surrogacy from legal parentage is sufficiently justified or effective).

69. *See* Mennesson v. France, Application n. 65192/11, Judgment 26 June 2014. Judgment of the Fifth Section of the European Court of Human Rights; Labassee v. France, Application n. 65941/11, Judgment 26 June 2014. Judgment of the Fifth Section of the European Court of Human Rights; Paradiso and Campanelli v. Italy, Application n. 25358/12, Judgment 27 January 2015. Judgment of the Twelfth Section of the European Court of Human Rights.

specific transactions.[70] The processes of granting legal parenthood and nationality increases inconsistency rather than minimize it. As long as the intended parents can get a child, imposing administrative difficulties will not necessarily deter future transactions, thus the effectiveness of this tool in ensuring ethical conduct of the market is questionable.[71]

3. National-International Consistency Model – Advantages and Disadvantages

A national-international consistency model is appealing. First, the demand for consistency has a strong normative base. It strengthens the view that the legitimacy of all state action, both domestic and international, derives from the same set of national core political principles. Whether a state has the authority to act in an international context must be justified normatively as part of a political theory that grants it sovereignty, and legitimized through domestic politics even when actions are performed beyond the border.[72] Consistency would allow consumers' states to adhere to their own moral systems and support national and socially based values by maintaining a moral-normative coherency between domestic and international policies. It can be established without a global normative consensus on what the right conception of justice is in matters of reproduction, family, assisted reproduction, bodily labor, or similar concerns. It can even be established without formal global institutions.[73] Consistent regulation can serve as an incentive to raise the medical standards in destination states that have relatively low standards. If the latter wanted to conduct transactions with foreign consumers from states with higher standards, destination countries would be obliged to measure up to higher normative demands and raise the threshold for acceptable terms of contracts in order for consumers' countries to register children born through safe and ethical contracts.

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70. *See, e.g.*, X & Y (foreign surrogacy) [2008] EWHC 3030 24 (fam) (U.K.); *Ellison and Anor & Karnchanit,* [2012] FamCA 602, para. 87 (AU) (acknowledging parentage as being in the best interests of the children, and stating it was too late to inquire into the legality of the arrangement); Tian v. Canada (Citizenship and Immigration), 2011 CanLii 75008 (Can. B.C) (The Immigration Refugee Board (IRB) noted that the payment may have exceeded the surrogate's reasonable expenses and that the surrogacy is "likely" contrary to the laws of both Canada and China, but this finding had no impact on the decision.); Claire Achmad, *New Zealand*, INT'L SURROGACY ARRANGEMENTS, *supra* note 9, at 308-09 (reporting a case (KR and DGR) in which the court claimed that policy considerations are not part of its authority and did not consider the way the procedure had been conducted abroad, and another case (BWS) in which the court acknowledged the consent of the surrogate although such consent could not have been acknowledged in N.Z.); INT'L SURROGACY ARRANGEMENTS, *supra* note 9, at 514.

71. *But see* Cohen, *How to Regulate Medical Tourism*, *supra* note 46, at 16 (stating that if the rule is well-publicized and strongly enforced, it may achieve high enough levels of deterrence that the number of children who end up being "surrogacy exiles" is close to zero).

72. *See* LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 22 (1989) (describing a similar, vertical thesis).

73. Frank J. Garcia, *Three Takes on Global Justice*, 31 LAVERNE L. REV. 323, 336 (2010).

The global-pluralism advantage of this model, however, is also its weakness. A mechanism that incorporates pluralistic national legislation might be ethically insufficient and unsatisfying if it fails to rise above a certain level of commitment to protecting suppliers of reproductive services, and leads to a 'race to the bottom' regarding rules of conduct and medical standards.[74] In consumers' countries whose national conduct is poor, although consistent transactions might answer the demand for consistency, they will keep resulting in structural injustice and exploitation. On a normative level, this model saws off the branch on which the universal norms of human rights rest, because it diverges from the demand for a universal minimal threshold. In the absence of some acceptable framework or minimal standards in this model, it is supported only by domestic political theories. Many of the standard arguments for civil and political rights rely on universalism and hence necessarily hold that some rights have a universal scope. A global justification of justice between the state and other states or with regard to foreigners should be embedded in some international aspects, rather than stem only from domestic political relations between a state and an individual.[75]

Moreover, the consistency model does not provide any argumentation as to why non-liberal states should be obliged to pursue liberal "just" foreign policies.[76] This model is based on global tolerance toward all policies and could imply a requirement of tolerance even toward non-liberal values and policies.[77] Governments of liberal states should act tolerantly in their dealings abroad in the same way their citizens expect them to act domestically. Yet, in the absence of a common ideological ground, there is no normative argument for requiring non-liberal states to adopt this model. Pressure to take part in these transactions might be sufficient to push them to do so voluntarily, but it may be futile in ameliorating the protections for women in at least some of the cross-border reproductive transactions between liberal and non-liberal states, such as between consumers from the West and women from China.

The legal tools I have presented as being viable options for a state to pursue domestically—extraterritorial criminalization and conditional legislation— are either merely symbolic or violate the rights of children. It is

74. Pennings, *supra* note 2, at 338-39 (arguing that a permissive universal rule according to which all states allow their citizens to receive services in other states might result in regulation according to the level of the most permissive country). *See also* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 42 (2011) [hereinafter NUSSBAUM, CREATING CAPABILITIES] (acknowledging that the threshold might be easy to meet but less than what human dignity requires).

75. BRILMAYER, *supra* note 72, at 29.

76. Garcia, *supra* note 73, at 337. *See also* Barry, *supra* note 17, at 233 (arguing that little can be achieved if no one feels morally compelled to struggle for reform of unjust rules).

77. *But see* Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 135 (2005) (discussing whether or not liberal states are obliged to tolerate non-liberal states or to try to transform them. Nagel argues that liberal states are not obliged either to tolerate non-liberal states or to try to transform them, because the duties of justice are essentially duties to our fellow citizens).

important to note that even if these tools can ensure a consistent national-international policy, they cannot necessarily guarantee a proper way of conduct, and are thus an inefficient solution to the problem of structural injustice resulting from global reproductive markets. In light of all these reservations, unilateral tools alone are not suitable for regulating cross-border reproductive transactions. In the following Section, I will argue that joint actions between actors could lead to more desirable transactions. Globalization forces us to elevate the level of analysis beyond the state and reevaluate the responsible bodies on an international scale. Effective measures to deal with the unjust effects of cross-border reproductive transactions would require the application of several approaches, national and transnational, on behalf of all stakeholders: consumers, women suppliers, governments and professional international institutions. Finally, I will suggest a shared responsibility model for cross-border reproductive transactions.

II. The Shared Responsibility Model

The late Iris Marion Young of the University of Chicago Political Science faculty worked on remedying structural injustice by reconceptualizing assessments of causation and responsibility. She noted that the common model of guilt or fault is usually unfit to deal with structural injustice, since it demands the assessment of intentions, motives, and consequences of actions.[78] In most cases of structural injustice, it is impossible to determine which specific actions of which specific actor caused each specific aspect of the structural process or its outcome.[79] For example, we could condemn destination countries for channeling their healthcare budgets to target foreign consumers' demands instead of providing essential primary healthcare for their own citizens. Although medical centers are often built with private money and not at governmental expense, public policies that seek to encourage the supply of services to foreign patients draw away professional staff who could have been part of the public healthcare system.[80] However, it is unclear whether the foundations of reproductive markets come at the expense of public resources that would otherwise fund the public healthcare system. Supporters of medical tourism argue that revenues generated from treating international patients can be used to cross-subsidize publicly funded healthcare.[81] Such policies could serve as a means to reduce emigration of healthcare providers to

78. Young, *supra* note 12, at 118.

79. *Id*. at 115.

80. *See* Annette B. Ramirez de Arellano, *Patients without Borders: The Emergence of Medical Tourism*, 37 Int'l J. Health Serv. 193, 196-97 (2007) for an example in the case of Thailand and India; *See also* Leigh Turner, *'First World Health Care at Third World Prices': Globalization, Bioethics and Medical Tourism*, 2 BioSocieties 303, 320 (2007) (discussing the "possible harms to inhabitants of destination Countries").

81. *See* Turner, *supra* note 80, at 315 for an example: Singapore. The cross-subsidize argument mentioned here is probably less relevant to reproductive services such as egg donation and surrogacy and more relevant to medical healthcare. Reproductive services are usu-

wealthier nations, and prevent the exportation of skilled healthcare workers out of the country.[82] In light of these arguments, it seems that background injustice may cause unjust effects that, although predictable, cannot be blamed on one specific actor.[83] The need to trace a direct relationship between the action of an identifiable entity and harm might let certain powerful parties involved in causing the injustice, albeit indirectly, off the hook. Young claimed that although we cannot blame all contributors, it is inappropriate to dismiss them.[84] In view of the difficulties of pinpointing a single body or entity accountable for the injustices that occur, this model does not fit all cases of structural social injustice.

Structural injustice does not merely exist, but is a consequence of the actions that states and other parties take. It is the result (or a side effect) of the actions of many people and of many legitimate (or at least acceptable) practices, rather than the result of an individual's action (as would be required in the typical blame model).[85] For example, consumers' states have a right to choose a reproductive policy allowing cross-border transactions, while the destination states have right to allow or forbid such transactions in their territory. It is the combination of national regulation in consumers' countries, insufficient protection in destination countries, and the decisions of individuals in the context of globalization as well as the neo-liberal international regime that results in injustice and negative implications.

Christian Barry, an Australian political philosopher, echoes Young in offering a somewhat similar model of shared responsibility for justice. Based on both of their parameters (some unique and others overlapping), I offer a slightly refined shared responsibility model. I suspect that market failure and externalization of negative implications are partly the result of the absence of a procedure that enables cooperation between bearers of responsibility. Joint action is necessary.[86] The solution should be multileveled and structural—a result of connection and cooperative action—as no single participant can stop injustice on her own. My model takes into consideration the responsibility of different kinds of actors, from different states, different background conditions and social positions, in a special context of interaction as a basis for the commitment to justice. In this sec-

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ally provided through private clinics, and this money does not enter the health system but rather reaches private hands.

82. *Id.* at 314.

83. Young, *supra* note 12, at 120. *See also* JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 266 (2013) (mentioning background injustice that occurs even though nobody acts unfairly or is aware of how the overall result of many separate exchanges affects the opportunities of others. Economic agents are not required to follow rules that can prevent these undesirable consequences, since they are often so far in the future, or so indirect, that restricting them would be an excessive burden).

84. Young, *supra* note 12, at 118.

85. *Id.* at 116.

86. *See* Anne Donchin, *Reproductive Tourism and the Quest for Global Gender Justice*, 24 BIOETHICS 323, 332 (2010) (arguing for concentrated cooperative action).

tion, I will present my model starting with the parameters of the shared responsibility model. I will then apply these parameters to the case of cross-border transactions.

1. Engaging Actors – Who Bears a Duty?

The engaging parameters locate the involved actors, and explain why they are assigned responsibilities (who are the contributors to injustice?). According to the engaging parameters, in the case of harms resulting from structural injustice, all actors directly and indirectly interconnected through in this structure should bear some responsibility for the injustice. Either because their actions contribute to the unjust structure or because of the benefit they gain from it.

a. Accountability and Benefit

The accountability parameter allocates responsibility according to the extent to which actors have contributed to bringing about the unjust situation, according to the causal connection of their actions (similar to Young's and Barry's principle of contribution).[87] Accountability is the common ground between the shared responsibility model and the classic blame model, a parameter that links the responsibilities of actors to the unjust structure. The difference is that the blame model looks at unacceptable behavior to inflict punishment or to exact compensation for past misbehavior, or potentially seek prevention of similar future events.[88] In contrast, the purpose of the accountability principle is always not to blame but rather to correct and prevent ongoing structural injustice. Hence, under this model, actors are not responsible in the sense of mal-intention, but in the sense that they have a duty to work within their capacity to remedy these injustices.[89]

The benefit parameter is based on the unjust gain each contributor gets from the illicit situation (privilege or beneficiary principle).[90] It relates to the amount of responsibility an actor should have: the higher the benefit, the greater the responsibility. Direct gain will result in greater responsibility, but even indirect gain indicates the actor has some level of

87. Barry, *supra* note 17, at 228; Young, *supra* note 12, at 119 (arguing that individuals bear responsibility when one's actions within a scheme of social cooperation contribute to injustice).

88. Young, *supra* note 12, at 120.

89. *See id.* at 114. ("All the persons who participate by their actions in the ongoing schemes of cooperation that constitute these structures are responsible for them, in the sense that they are part of the process which causes them. They are not responsible, however, in the sense of having directed the process or intended its outcomes.").

90. Barry, *supra* note 17, at 229 (*Beneficiary* – the one who has benefited more from the injustice is assigned greater responsibility; Young, *supra* note 12, at 128 (arguing that whoever benefits more from structural injustice should be considered more liable).

responsibility.[91] The actors that benefit more are usually those who have the capacity to change the structure in their favor.

Accountability and benefit parameters redirect attention from the consequence to the contributors, from those who experience justice and injustice, to those who produce them.[92] The pragmatic advantage of the engaging parameters is significant. While the blame model must prove exploitation in order to find the responsible bodies, the focus on accountable actors makes it possible to minimize vague evaluations (and disagreement) regarding the actual effect of suppliers' vulnerability on their autonomous decision (in order to determine exploitation), or what should be fair to citizens of one country in comparison to another.

This Article next examines who the engaged actors in cross-border reproductive transactions are and what level of responsibility each contributor bears.

2. Who the Engaged Contributors are in Cross-border Reproductive Transactions

In order to implement accountabilities according to the shared responsibility model, actors should be those authorized to act in any of the areas that interface with cross-border reproductive markets and offer an improvement. If those authorized to act have the potential to remedy some of the injustice, then the duties to meet ethical standards should apply to international institutions (including professional organizations and NGOs), states (both consumers' and destination states), and individuals from different states (consumers and suppliers of the transactions, physicians, clinics, and mediators). All have responsibilities when engaging in cross-border reproductive transactions.[93]

Institutions are engaged because they structure and are structured by common activities in the global sphere.[94] The interactions within any cross-border market, and specifically those in the reproductive services, are mediated by institutions so that individuals can enjoy market relationships.[95] Institutional rules and roles enable members to do things together without necessarily sharing personal relationships. Institutions create the value necessary to pursue common goals, grant recognition between fellow actors, and provide the necessary social coordination needed to sustain

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91. Yossi Dahan et al., *Global Justice, Labor Standards and Responsibility*, 12 THEORETICAL INQUIRIES L. 439, 463 (2011).

92. *Compare* "model of active justice" *with* "the consequentialist model," Thomas W. Pogge, *Responsibilities for Poverty – Related Ill Health*, 16 ETHICS & INT'L AFFAIRS, 71, 75, 77 (2002) [hereinafter Pogge, *Responsibilities for Poverty*].

93. For stakeholders that benefit from the structure, see Donchin, *supra* note 86, at 330; Points, *supra* note 6, at 3, ("Infertility clinics, healthcare providers, medical tourism companies, the broader tourism industry, the Indian government, and the women who provide surrogacy services all profit from this industry.").

94. *See* Jonathan Seglow, *Associative Duties and Global Justice*, 7 J. MORAL PHIL. 54, 57 (2010) (for the inclusion of institutions on a social relationship-based ground).

95. JONATHAN SEGLOW, DEFENDING ASSOCIATIVE DUTIES 42-3 (2013).

social relationships. Conditions for the healthcare industry's growth are supported by the neo-liberal agreements negotiated in international trade organizations; health organizations which control medical hazards and human rights institutions that ensure that health rights and women's rights are not violated. Since the hegemonic existence of the market provides the setting for cross-border reproductive transactions, international institutions that facilitate the protection of human rights, trade, travel, and health standards, the accreditation of foreign hospitals, and the training and credentialing of foreign doctors should all be included.[96] As such, institutions are expected to weigh the impact their policies have on others according to the nature and context of their involvement. I believe that a desirable policy requires cooperation between international institutions that specialize in these matters, and among these institutions and states.

The focus on international institutions is not separate from the accountability of states, which are globally and nationally entangled in global governance. Shared responsibility analysis exposes more connections between national and international economic systems. Each country has some responsibility towards their citizens. Consumer countries have responsibility over actions within their direct authority in terms of the regulation of family related policies, and these domestic policies are complimentary to the responsibilities that destination countries have to suppliers. States are also accountable for the domestic implementation of international law and for the negative consequence that national policies have beyond their borders. Some of the responsibilities of consumers' countries are indirect: for example, for their part in designing the international order and regulating cross-border trade. Thus states should be held responsible for changing these structures when they are unjust. Other duties are residual and occur only because destination countries do not comply with their own duties towards their poor (such as duties to provide basic needs).

The assumption is that those who benefit from unjust structures are accountable. Destination states gain revenue and consumers' states gain access to reproductive services. Both fall within the benefit parameter, thus should be held responsible accordingly. In view of states' gains and interests in cross-border reproductive transactions, destination and consumers' states should not be exempt from their responsibilities. As actors, both have duties towards their citizens and toward fellow actors who are each other's citizens. They should therefore share the responsibility for the unjust structure that cross-border reproductive transactions create.

Consumers bear direct responsibility for purchasing choices that sustain exploitation. Since the transaction is supposed to benefit its parties, some sorts of duty exists between them, regardless of nationality. Additional individual responsibility stems from familial relationships. The in-

96. Though several evaluative bodies are used to assess institutional quality, the Joint Commission International is now the dominant global player in the international hospital accreditation business. For international accreditation, see Turner, *supra* note 80, at 311; Cohen, *Medical Tourism and Global Justice*, *supra* note 49, at 36.

volvement of foreign women in the process of reproduction has implications for the resulting children's right to know their biological parents or for future medical possibilities that might be connected to the egg donor or surrogate. The model assigns certain duties between consumers and suppliers for their share in the industry, that is, the specific transactions in which they are involved. Individuals hold the additional indirect responsibility for the reproductive policies created by the politicians they elect. Yet, individual contribution to the world order creates normatively weaker duties, and individual effort to address unjust structures might be futile.[97]

Finally, physicians, private clinics and mediators contribute to the cross-border reproductive milieu through their professional and economic roles. All earn their fees from such transactions and have a lot to gain from engaging in this system.[98] These actors should be liable for their professional and business roles in the industry and for their general contribution to the structure.

The added value of the shared responsibility model is, first, that the scope and type of actors involved is wider. The shared responsibility model allows us to examine how all these parties are entangled in cross-border processes and accounts for actors that the blame model might have neglected. Second, the shared responsibility model is not limited to direct causal connections and thus avoids allowing those indirectly involved shirk responsibility. This inclusion is helpful even when the unjust situation stems from an unfortunate combination of legal actions that inadvertently results in injustice; where the number of actors responsible for a certain situation has increased to the point that it is doubtful whether a single actor, even a state or an international institution, could remedy the injustice by itself; or where multiple contributors are assigned only a small amount of responsibility and no one effectively bears the responsibility to correct the injustice.[99] These parameters are therefore more realistic regarding how actors are involved in the global legal, social, and economic networks. Each actor is personally responsible for the outcome of its actions, at least partially, and therefore bears an independent responsibility to remedy injustice. Accordingly, engaging one actor according to this pa-

97. *Compare* Pogge, *Responsibilities for Poverty*, *supra* note 92, at 74 (assigning responsibilities to citizens of the developed countries for supporting politicians that are willing to shape global institutions to support their interests, rather than help foreign victims of the current institutions), *with* David Miller, *National Responsibility and Global Justice*, 11 CRITICAL REV. INT'L SOC. & POL. PHIL. 383, 385 (2008) (claiming that such a responsibility is a matter of degree according to the ability of citizens to control the direction in which their society is moving and the viable external conditions that a state faces in important areas of decisions such as economic and social policy. When the public sphere is privatized, it is doubtful whether states truly represent all populations in the national sphere, hence citizens are held responsible). *But see id.* at 387-88 (2008) ("ultimately, individual responsibility should be symmetric. If we assign such responsibility to consumers, people in poor states should be held responsible for their situation and their votes.").

98. Donchin, *supra* note 86, at 330.

99. Barry, *supra* note 17, at 222; Dahan, *supra* note 91, at 449.

rameter does not dismiss other duties that stem from other relations, and the responsibility of one actor is not reduced if another fails to fulfill its own responsibility. Having clarified how each actor is engaged, I will next elaborate on the sort of responsibilities each actor should have.

3. Assigning Duties

After recognizing the actors engaged, assigning parameters relate to the sort and the amount of responsibility that each actor bears, and to the site where they are expected to take action. Since each actor is differently positioned in the structure (the practice of cross-border reproductive markets) each has different responsibilities in nature and scope. For example, institutions have different responsibilities than individuals, and strong actors have wider responsibilities than those with weaker capacities.

a. Capacity – How to Assign Duties

Both Young and Barry note the importance of an actor's capacity to make a change (the capacity or power principle). The capacity principle requires each actor to be accountable only for the sort of things that are within their ability to change.[100] Young claimed that contributors should focus on injustices where they have a greater capacity to influence the underlying structural processes.[101] The scope of the expected action is in accordance with the position of power of each actor. Those institutionally and materially situated to be able to do more to affect the conditions of vulnerability, such as states and institutions, have greater duties than less powerful individuals or groups.[102] This is a very effective and practical condition, because it transfers many responsibilities from individuals to stronger actors, taking into consideration different levels of power.

Although I agree that change may be difficult to achieve without the involvement of strong actors, such as states, I have two reservations about this capacity principle. First, analyzing cross-border reproductive issues in terms of capacity will always lead us to the same strong actors (governments, international institutions, or powerful corporations) as these actors hold the greatest power. The capacity mechanism must be sensitive enough to ensure that in spite of the many duties assigned to these strong actors, weaker actors' responsibilities are not dismissed. Second, Young assumed that the more interest one has in the results of a process, the more power one often has to change it.[103] This point was justly criticized by Dahan et al., arguing that the greatest interest often belongs to the victims, who do not necessarily have the greatest power to remedy the structure and should not be assigned greater responsibility.[104] The vested

100. For capacity to alleviate unjust conditions, *see* Barry, *supra* note 17, at 230-31. On power, *see* Young, *supra* note 12, at 127.

101. Young, *supra* note 12, at 127.

102. *Id.* at 106.

103. *Id.* at 128.

104. Dahan, *supra* note 91, at 457.

interest of actors may, however, prioritize the projects within their capacity.[105] With each actor having many different duties, they actor should probably focus on those in which he has the greater interest (and capacity) to decrease injustice. For example, consumers' states would have greater interest to harmonize nationality issues of the resulting children, while women's organizations should strongly push towards the protection of women.

b. Connectedness - What Kind of Duty?

Barry mentions the condition of *connectedness* – the allocation of duty on the basis of special relationships.[106] I read this parameter as articulating the different kinds of duties each actor is expected to bear due to the special roles that connect each actor to another, rather than how each actor is connected to the injustice (the connection to injustice is a preliminary engagement criterion rather than a parameter for assigning responsibilities). The connectedness parameter makes it possible to assign different duties in different relationship circumstances. Each duty is in accordance with the specific level of commitment to justice, and the different values that actors have.[107] When one actor is less involved, his duties are less stringent as a result. The possibility of scaled degrees of connectedness, and therefore scaled degrees of cooperation, allows room for flexible normative principles that are more effective and that can improve compliance.

This parameter makes it possible to assign responsibilities according to infrequently acknowledged relationships, namely those between nation-states and international institutions and those between individuals and the international institutions regulating the trade regime. Transnational, state, institutional, and private responsibilities all go hand in hand.[108] When the focus is on the meaning of the relationship between actors, an additional aspect of recognition and consideration of other actors is promoted. Some duties may relate to rights or care, for example, rather than to purely legal, economic, or contractual fairness issues.

Moreover, this parameter enables us to change the bearer of a specific duty according to the context of each case. For example, it can be argued that the Third World is not limited to places that are beyond the borders of Western states. Migrants and the poor in developed countries perform similar labors, which are similarly devalued by consumers. The difference

105. *See* Young, *supra* note 12, at 129 (suggesting prioritization according to the ease of recruiting support and collective actions, which could also be seen as a form of power).

106. Barry, *supra* note 17, at 229.

107. *See* David Miller, *Reasonable Partiality towards Compatriots*, 8 ETHICAL THEORY & MORAL PRAC. 63, 72 (2005) (arguing that the final weight of a duty would be the product of two factors: the content of the duty, and the closeness of our attachment to the people to whom the duty is owed).

108. *See* Bhupinder S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT'L L. 1, 27 (2004); Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 295 (1999).

between national and international regulation would be the bearer of responsibility. In a domestic surrogacy transaction, the entire responsibility for the framework of markets lies with the state and its institutions (both to provide basic capabilities and to ensure just conditions for transacting due to the state commitment towards people who are within its territory). In cross-border markets, some of the same responsibilities might be shared with international institutions or with other actor states.

III. Shared Responsibility and the Need for Joint Action - Recommendations

The shared responsibility model does not assume one proper way of behavior, but supports multiple alternative interpretations. In light of the evidence of growing demand, it is doubtful that banning reproductive service markets would be practically possible. Thus, this model aims at changing the balance of the market. Rather than leave suppliers with the choice between living in poverty and entering into a transaction in which they are unrecognized and become vulnerable to exploitation, the model leaves the choice in the hands of consumers: either to use reproductive services while granting the suppliers recognition for their contribution, or to not use the services.[109] Pursuant to the demand that all actors involved receive protection, suppliers be recognized, and their position in the market empowered, legitimate transactions are likely to become more expensive.[110] I would hazard a guess that if suppliers were to gain a certain level of recognition and a fair distribution of benefits, "desirable transactions" would not be as profitable for consumers and demand would decrease.

Reforms advanced at one level may modify or subvert goals at another level, and thus might work at cross-purposes.[111] Potential pitfalls to this model are that it would likely increase the industry instead of restricting it. Enhancing reproductive protections would encourage more transactions to take place. It will probably enhance the legitimacy of these market transactions especially for those who see the harms of the industry in the way transactions are being carried out rather than in something inherent to the process of surrogacy. Nevertheless, I believe that the entire framework I suggest is sufficiently moderate to balance the increased demand due to legitimacy given to desirable transactions.

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109. *Cf.* Walzer, *supra* note 14, at 61 (regarding guest workers; "Democratic citizens, then, have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labor market to get socially necessary work done. And those are their only choices.").

110. *Cf. id.* at 176 (arguing that higher payment is a direct consequence of hiring (recognized) fellow citizens for hard work, previously done by others and sold at lower cost).

111. Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 Mich. J. Int'l L. 199, 212 (2005).

	The conditions for legitimizing the market	**Legal parenthood and nationality**	**Medical standard**	**Terms of contract**	**Wider consideration**
International institutions	WTO - Consider limitations on tradability.	Human rights - Protection of children's rights.	WHO – professional medical standards for egg recruitment and surrogacy services.	Cooperation between international institutions (WHO, women's organizations, WTO, etc.) in monitoring. 1. Establish minimal human rights-related conditions. 2. Fair rade model.	Advancing a framework to minimize inequality and poverty of all states and different populations in them. Advancing fair procedural rules of conduct in the international order, representation and recognition of the interests of different populations.
Destination countries		Joint cooperation for agreements to minimize disharmony of legal parenthood and nationality issues. (Hague convention model).	Enforcing proper medical standards according to internationally recognized standards (might require equalizing thestandard for local citizens who give birth to their own babies).	1. Negotiate fair trade model. 2. Supportive legislation that promotes international standards of human rights and fair trade.	Ensuring capabilities and safety nets for the poor (Sen, Nussbaum), through meaningful work or welfare programs. 2. Participation in international regulation.
Consumers' countries	Considering national policy in regards to principles of consistency and proportionality.		If destination countries do not have enough resources to secure a market above minimal standards, consumers' countries might be required to assist.	1. Negotiate fair trade model. 2. Supportive legislation that promotes international standards of human rights and fair trade. 3. Revision of contracts in light of human rights and fair trade.	1. Striving to change the international structure. 2. Participation in international regulation.
Individual associates	Responsibility for personal choices.		Responsibility for contracts that safeguard the rights of suppliers.	1. Responsibility for personal transactions. 2. Consumer pressure for fair trade.	
NGOs	Representation of individuals in the international process.		Representation of individuals in the international process.	Representation of individuals in the international process.	Representation of individuals in the international process.

1. Legal Parenthood and the Nationality of the Child

Legal parenthood and the nationality of the children resulting from cross-border surrogacy transactions are probably the most difficult issues to coordinate. On the one hand, nationality concerns are country-specific decisions that do not rely on a universal rule. On the other hand, these

decisions are directly connected to the human right to plan a family and to children's rights, such as the right to nationality (i.e., to be recognized as a citizen of some country), the right to be registered after birth, and other universal norms.[112]

One possibility is that a child could have several registered relationships: the genetic, the gestational, and the intended. States would have a duty to register them, and this registration could support states' duties according to human rights norms. Registering the supplier as the biological/genetic mother should grant the child at least one nationality according to most nationality policies, and perhaps, indirectly, may also support children's rights: it will reduce cases of statelessness, ensure the right of the children to obtain information about their origin, and be fruitful in cases where medical knowledge of a genetic background is needed to treat the resulting child.

Registration will not solve the problem without parallel recognition by other states. Recognition of parenthood and registration of nationality both require some comity among various foreign institutions and an understanding between states, similar to the understanding regarding international adoption.[113] Comity expresses legal reciprocity and the extension of certain courtesies to other nations, particularly by recognizing the validity and effect of a jurisdiction's executive, legislative, and judicial acts.[114] The shared responsibility model could therefore assign duties to states to engage in these efforts to address recognition of cross-border reproductive transactions. There are two alternative legal tools that could be helpful here: an international convention or multilateral agreements. A convention would provide a framework of international cooperation and could establish procedural rules that would facilitate the process.[115] Such a convention would outline procedural rules for acknowledging public records regarding legal parenthood by assigning responsibilities to states and authorities, and ensuring that the rights of children are upheld. A convention could be efficient once a common understanding is reached. In the meanwhile, taking into consideration the current disharmonious international reality, multilateral agreements are a more likely option. They make it possible to articulate regulation based on a specific understanding between specific countries, and thus have greater potential to gain legitimacy. This tool would enable consumers' states to uphold their own

112. Sharon Bassan, *Can Human Rights Protect Surrogate Women in The Cross-Border Market?* Hague Academy Law Books (forthcoming, 2015).

113. See, e.g., Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 32 I.L.M. 1134, 1136 (1993) [hereinafter *Hague Convention on the Protection of Children*].

114. On comity, *see* Storrow, *supra* note 26, at 543.

115. *See generally,* Int'l Surrogacy Arrangements, *supra* note 10, at 533-540. *Cf.* Hanna Baker, *A Possible Future Instrument in International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention*, *in* Int'l Surrogacy Arrangements, *supra* note 10, at 411, 420-21 (describing the convention regarding international adoption as both an administrative tool as part of private international law and a human rights instrument).

policies, and minimize problems that would require ad hoc solutions, such as recognizing children that are the result of cross-border transactions, which would be unacceptable according to domestic policies.

Some efforts are currently being made on a diplomatic level. In 2010, the General Consuls of eight European states wrote a joint letter to a number of clinics in India requesting that they cease providing surrogacy options to their citizens unless consumers first consulted with their embassy on these matters.[116] The United Kingdom also issued new guidance for prospective parents looking at cross-border reproductive care, urging them to ensure beforehand that they are fully aware of the facts and are well prepared.[117] The Israeli embassy in Bangkok sent a query to the Thai Ministry of Foreign Affairs regarding the hiring of Thai female nationals to act as surrogate mothers by Israeli nationals in order to make sure that the procedure was acceptable, and to verify that the child would not remain stateless.[118] In a parallel effort, the Indian bill conditioned the eligibility to purchase services on proof from consumers that the resulting child would be permitted entry, that they could register the child as their child, and that the children would be granted citizenship in the consumers' state.[119] Finally, in order to create a better balance between the interests of the concerned actors, as well as a higher ethical standard, The Hague Conference on Private International Law (HCCH) is currently investigating the prospects of the adoption of international instruments on cross-border surrogacy transactions.[120]

2. Proper Medical Standards

In cross-border markets, it is unclear what are the ethical and professional standards. According to some reports, reproductive services are supplied in high-level facilities in developing countries and pose fewer risks to public health than other treatments provided as part of medical

116. For France, Germany, Spain, Italy, Netherlands, Poland and Czech Republic, *see IVF Centres Direct Foreigners to Consulates over Surrogacy Issue*, HINDUSTAN TIMES, (July 15, 2010), www.hindustantimes.com/India-news/Mumbai/IVF-centres-direct-foreigners-to-consulates-over-surrogacy-issue/Article1-572534.aspx.

117. *See* FOREIGN & COMMONWEALTH OFFICE, *Surrogacy Overseas*, (June 19, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324487/Surrogacy_overseas__updated_June_14_.pdf.

118. Letter no. 1403/2756 from Thai. Ministry of Foreign Affairs, Bangkok, to the Embassy of Isr., Bangkok (Dec. 12, 2013) (on file with the author) (clarifying that the law grants Thai citizenship to any child born to a Thai mother. Additionally, the letter states that Thailand does not yet have specific regulation on this issue, but an act that had recently been drafted explicitly prohibited commercial surrogacy. Therefore at that time the Thai position neither supported nor encouraged the phenomenon, and considered it in contravention of the Thai Anti Human Trafficking Act BE 2551 (2008)).

119. The Assisted Reproductive Technologies (Regulation) Bill 2010, cl. 34.19 (India), http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf.

120. *See The "Parentage/Surrogacy Project" – About the Project,* HAGUE CONF. ON PRIV. INT'L LAW, http://www.hcch.net/index_en.php?act=text.display&tid=181 (last visited Sept. 10, 2015).

tourism.[121] Nevertheless, the oversight of health, safety, or professional credentials in clinics that supply reproductive services to foreigners may be limited to national and regional registries, and even where the practice is regulated it can be under-enforced. The safeguards to protect the health of suppliers vary.[122] At least in a few destination countries, where accreditation is voluntary, there is no control over fertility clinics that choose not to be associated with the registries.[123] The result is that non-accredited clinics have total discretion over how to run their clinics and which services to offer, and they are free from official oversight.

Supplying reproductive services in the absence of proper medical care, supervision, or follow-up endangers suppliers and the resulting children, and violates their rights to health. This situation is undesirable for both parties to the transactions, as well as for their countries. Medical complications can burden the healthcare systems in both consumers' and destination countries. First, a supplier might suffer complications and burden healthcare systems in destination countries where the complications occur. Second, the children born from the procedure might receive unsatisfactory care, or bring diseases into the consumers' country once they go to their new homes. Consumer countries might have to internalize the medical harms caused by an insufficient standard of medical care in destination countries.[124] Which associates are connected to this harm? Which have the

121. *See* Robert K. Crone, *Flat Medicine? Exploring Trends in the Globalization of Health Care*, 83 ACAD. MED. 117, 120 (2008) (regarding general medical tourism) (reporting that patients are treated by highly skilled doctors, sometimes with better technical novelty than is available elsewhere); George Palattiyil et al., *Globalization and Cross-Border Reproductive Services: Ethical Implications of Surrogacy in India for Social Work*, 53 INT'L SOC. WORK 686, 687 (2010) (arguing that the services delivered are comparable with similar services provided in the developed countries, but prices are much cheaper. Some hospitals and universities are globally recognized 'brands,' and partner with clinics in destination countries, where they fly both patients and doctors from the country of origin, to enjoy cheap services of the same quality).

122. Bassan, *supra* note 112.

123. *See* Andrea Whittaker, *Challenges of Medical Travel to Global Regulation: A Case Study of Reproductive Travel in Asia*, 10 GLOBAL SOC. POL'Y 396, 400 (2010). *E.g.*, Florencia Luna, *Assisted Reproductive Technology in Latin America: Some Ethical and Socio-cultural Issues*, *in* CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION: REPORT OF A MEETING ON "MEDICAL, ETHICAL AND SOCIAL ASPECTS OF ASSISTED REPRODUCTION" HELD AT WHO HEADQUARTERS 31, 38 (E. Vayena, P. Rowe & G. David, eds., 2001), http://www.who.int/reproductive-health/infertility/7.pdf; Pennings, *supra* note 2, at 337 (in Belgium, for instance, the policies concerning assisted reproduction differ considerably between secular hospitals and Catholic hospitals). For registration uncertainty in India, *compare* CENTER FOR SOCIAL RESEARCH, *supra* note 8, at 23; Lal, *supra* note 8 (reporting 600 IVF clinics in both rural and urban areas in almost all states of India) *with* Sheela Saravanan, *An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India*, 8 PHIL. ETHICS & HUMAN. MED. 1, 1 (2013) (reporting about 3000 registered clinics across India offering surrogacy services, according to official figures).

124. Regarding the self-interest of developed countries in the regulation of the medical services market, see Cohen, *How to Regulate Medical Tourism*, *supra* note 46, at 13; Cohen, *Medical Tourism and Global Justice*, *supra* note 49, at 16. *See, e.g.*, Françoise Merlet, *Regulatory Framework in Assisted Reproductive Technologies, Relevance and Main Issues*, 47 FOLIA

capacity to act? While both states and individuals are engaged, solutions require health regulation and monitoring and thus fall within the capacity of states, rather than of individuals. In addition to being ethically required, clear professional guidelines could benefit all cross-border reproductive associates potentially harmed by this diverse array of regulations, standards and procedures.

As long as services such as egg recruitment or surrogacy are provided, destination states need to ensure that the practice does not endanger the health of suppliers and is provided according to professional and ethical guidelines. No treatment, whether through reproductive services transactions or otherwise, should violate the suppliers' health rights.[125] These recommendations are hardly innovative and should have been incorporated in cross-border reproductive transactions. A proper medical standard should ensure minimal conditions for safe procedures and could be universal, since good medical practice for pregnant women does not depend on cultural or national values, but rather on evidence-based medicine. Although standards are not typically backed by sanctions, international institutions, such as the WHO or other professional organizations, could set helpful professional standards of medical care.[126]

An ethical concern may arise if the standards applied to naturally pregnant women who deliver their own children in destination countries are lower than the standards for those who are carrying a pregnancy for foreign women. Generally, the access to sexual and reproductive healthcare services in destination countries should improve for all women.[127]

HISTOCHEMICA ET CYTOBIOLOGICA S9, S12 (2009) (relating to different levels of safety that jeopardizes both consumers' countries and suppliers); Turner, *supra* note 80, at 318 (arguing that it is possible that advertising as well as information provided by the clinic minimizes the risks and exaggerates the benefits in order to encourage consumers to pursue treatment. The advertisemenet is thus unreliable).

125. For human rights as the minimal threshold, *see* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 25 (2nd ed., 2008). On the content and substance of the right to health, *see* Aeyal Gross, *The Right to Health in an Era of Privatization and Globalization - National and International Perspectives*, *in* EXPLORING SOCIAL RIGHTS 289, 295 (Daphne Barak-Erez & Aeyal Gross eds., 2007).

126. *How to Regulate Medical Tourism*, *supra* note 46, at 19.

127. The role of the state is to act in order to provide equal, nondiscriminatory access to the benefits of health services to all individuals, *see* Economic and Social Council, *ICESCR General Comment No. 14 (The Right to the Highest Attainable Standard of Health)*, UN DOC. E/C.12/2000/4, art. 12 (Aug. 11, 2000) (stating that the state should adopt a public health strategy, addressing the health concerns of the entire population, including those whose poverty, disabilities, or background make them the most vulnerable; provide measures to eliminate barriers that women face in gaining access to healthcare services, including affordable prices (art 12(1)(21)); ensure information and education and enforce the obligation to respect, protect and fulfill women's rights to healthcare *both in public and private systems* (art 12(1)(13-14)). States are also obligated to respect the negative aspects (freedoms) of the right to health, to refrain from directly or indirectly interfering with the enjoyment of a right by denying or limiting access, by blocking equal treatment for all people, or by enforcing discriminatory practices or prohibiting third parties to deprive its people of the guaranteed right.). *See also* Audrey R. Chapman, *Globalization, Human Rights, and the Social Determinants of Health*, 23 BIOETHICS 97, 102 (2009).

From the perspective of the right to health, states are obligated to provide measures to minimize barriers interfering with women's access to healthcare services, such as prohibitively high prices for provided services, lack of reproductive education and information, and a lack of respect for women's rights to healthcare both in public and private systems.[128] Destination states should try to enforce proper standards in clinics that provide reproductive services and empower suppliers to make informed decisions by providing these women with critical information about the procedure, so as to improve women's understanding of the impact their decisions have on their bodies and health.[129] It means that in order to ensure minimal professional standards in cross-border reproductive transactions, the position of all women, especially poor women, needs to improve. The state's ability to fulfill its duty to provide this information to all pregnant women in their country is impacted by the amount of resources it can devote to women's health in general.[130]

International law can help solve this problem. The obligations of states to promote human rights are relative to their levels of development and available resources.[131] Besides "core obligations" associated with the right to health,[132] the International Covenant on Economic, Social and Cultural Rights includes an article that imposes a duty on lower-middle-income countries to take steps to the fullest potential of their available resources, with a view towards progressively achieving the full realization of rights recognized in the Covenant.[133] This may imply that in poor and lower-middle-income countries with limited ability to protect health rights, the duty to ensure the standard of care should be lower than in affluent countries.[134] When resources are limited, poor countries may not be able

128. Elimination of Discrimination against Women Council, *Gen. Recommendation No. 24*, U.N. Doc A/54/38/Rev.1, at 5-9 (May 4, 1999).

129. *See, e.g.*, Donchin, *supra* note 86 at 326-327 (calling for a greater duty to explain the risks than that of women who are undergoing treatment to circumvent their own infertility, because these women are being treated for another's benefit, and the treating clinic has a powerful incentive to maximize benefits to those who pay their fees. For example, she mentions a duty to tell egg donors in advance that they might have difficulty conceiving in the future or might give birth to a child who develops a disability).

130. *See, e.g.*, Tobin, *supra* note 4, at 346 (regarding the costs of the measures required to ensure that a woman provides her fully-informed and free consent).

131. Chapman, *supra* note 127, at 102.

132. For the core obligations as identified by the Committee on Economic, Social and Cultural Rights, see Economic and Social Council, *ICESCR General Comment No. 3 (The Nature of States Parties' Obligations (Fifth session, 1990))*, U.N. Doc. E/1991/23 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, art. 10 (2003). *See also Health*, *in* A. Clapham & S. Marks, International Human Rights Lexicon 197, 202 (2005); Lawrence O. Gostin, Global Health Law 259 (2014).

133. International Covenant on Economic, Social and Cultural Rights, art. 2, 993 U.N.T.S. 3 (1966); S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

134. *See* Lisa Forman, What Future for the Minimum Core? Contextualizing the Implications of South African Socioeconomic Rights Jurisprudence for the International Human

to fully comply with their human rights duties. However impoverished, destination states should not be exempt from their core duties if they fail to allocate resources responsibly, or to adopt needed legislative measures.[135] In cases where the country has extremely poor health services, determining whether or not the state has fulfilled its duties requires considering the overall allocation of resources to healthcare as compared to other sectors, rather than relying solely on examining national resource allocation within the healthcare system.[136]

Accordingly, a shared responsibility model requires a foundation for more extensive international assistance and cooperation. The fact that destination countries should alleviate the harms caused by cross-border reproductive care but fail to do so ought not to prevent consumers' countries and international institutions from fulfilling their commitments. The International Covenant on Economic, Social and Cultural Rights implies that the residual responsibilities of states, particularly those with greater financial and technical resources, are to assist and cooperate beyond their borders.[137] It emphasizes the importance of international financial aid and technical assistance for achieving the goals of the Covenant. Consumers' state duties may include tax-financed official development aid, paid by clinics or doctors that mediate cross-border reproductive transaction services, to ensure that suppliers have medical insurance, according to just principles.[138] This would not release destination countries from the duty to

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Right to Health, in GLOBAL HEALTH AND HUMAN RIGHTS: LEGAL AND PHILOSOPHICAL PERSPECTIVES 63, 63 (John Harrington, Maria Stuttaford, eds., 2009).

135. *See* Amartya Sen, *Why health equity?*, 11 HEALTH ECON. 659, 661 (2002).

136. For accountability for reasonableness regarding resource allocation in developing countries, *see* NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY, chap. 10 (2008).

137. Chapman, *supra* note 127, at 103 (arguing that article 2 of the International Covenant on Economic, Social and Cultural Rights emphasizes the importance of international financial aid and technical assistance for implementing the rights in the Covenant. It also implies the human rights responsibilities of states, particularly those with greater financial and technical resources, beyond their borders.); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 645 (1991) (calling for expansion of state responsibility to incorporate responsibility for systemic injustice based on international conventions).

138. For a tax from rich countries regarding medicines, *see generally* NUSSBAUM, CREATING CAPABILITIES, *supra* note 74, at 117 (2011); MARTHA NUSSBAUM, FRONTIERS OF JUSTICE 316 (2006) [hereinafter NUSSBAUM, FRONTIERS OF JUSTICE] (arguing that rich nations ought to give a minimum of 2 percent of GDP to poorer nations. A mechanism should be developed to transfer this money to suppliers in other countries or to advance their interests.); Cohen, *How to Regulate Medical Tourism*, *supra* note 46, at 17; Thomas Pogge, *Access to Medicines*, 1 PUB. HEALTH ETHICS 73, 76-78 (2008). *See, e.g.*, About, UNITAIDS, http://www.unitaid.eu/en/who/about-unitaid (last visited Feb. 19, 2014) (29 countries have voluntarily chosen to impose on airlines departing from their countries a tax on departing passenger tickets collected by the airlines set by the country in order to fund UNITAIDS, a NGO aimed at scaling up access to treatment for HIV/AIDS, malaria and tuberculosis, primarily for people in low-income countries. Similar funding could be directed to medical insurance of suppliers, or women's health funds in destination countries). The problem remains with transactions that are constructed online through international brokers.

promote relevant public goals and allocate resources among their own citizens.

While the required medical standards for performing egg recruitment or IVF procedures in a surrogate apply to all procedures across the globe and should be universal, when it comes to contract terms, a more flexible approach may be appropriate. Contracts can require more flexible regulation and may be open to negotiation between actors, with the understanding that there is some room for contextual interpretation. The next part will suggest possible tools for ensuring that parties reach mutually desirable terms in their contract.

3. The Terms of the Contract

The shared responsibility model might be able to minimize concerns regarding exploitative conditions and help reduce the negative impacts of cross-border reproductive transactions. Known information regarding the current exploitative practice of surrogacy transactions indicates aspects that contracts should address, including informed consent, the price, living standards of surrogates during pregnancy, basic freedoms (right to movement, right to control their bodies), family visiting rights, medical insurance, screening processes of potential suppliers, medical-ethical considerations such as a neutral personal doctor for suppliers, translators for the surrogate, the supplier's right to complain or press charges, the surrogate's assimilation back in her community after birth, and more.[139] This Article's proposal regarding legal regulation of contracts is based on two concepts: the demands of basic human rights and fair trade.

a. Human Rights Protection

Aside from a few specific clauses, most contract terms should and could be universal, as they regard basic rights that should not be violated.[140] Using human rights as a starting point offers substantive and practical benefits.[141] The rights framework is based on a common ground for cooperation and clarifies an acceptable universal benchmark, while allowing for contextual national interpretation. Human rights provide a mechanism to confront violation of rights and an enforcement system that could be effective. The human rights mechanism enables international monitoring, possibly with the help of international institutions as part of a global strategy, while also addressing individual claims, as contracts are between individuals rather than states.

At the international level, a political mechanism should allow professional and human rights organizations to resist powerful political and eco-

139. I will elaborate on the content of desirable contracts in the Israeli example, *infra* sec. III.4.

140. For human rights implications of cross-border surrogacy transactions, *see* Bassan, *supra* note 112; Ergas, *supra* note 66, at 428.

141. On the use of international human rights as a legal instrument, *see* Chimni, *supra* note 108, at 14-15; Ergas, *supra* note 66, at 429.

nomic interests that may compromise human rights in order to promote neo-liberal considerations.[142] There are some international legal tools related to health and trade that could be of use. The WHO's International Health Regulations encourage states to implement health measures, in accordance with their relevant national laws and obligations under international law, in response to specific public health risks or public health emergencies of international concern.[143] As there is ample evidence of unsafe practices in the reproductive sphere, international regulation would be helpful, restricting trade in reproductive services and basing these rules on international standards. The Framework Convention on Tobacco Control could serve as a model legal framework, given that it is responsive to the similar concern that liberalizing trade might encourage consumption.[144] Using a framework convention similar to the one on Tobacco control should not prevent states from entering into compatible multilateral agreements, but rather encourage governments to adopt measures beyond those required by the Convention.

b. Safeguards for Negotiable Elements

While medical standards and human rights issues cannot be compromised, other issues within the contract are negotiable and could be left to the choice of the parties within a framework that safeguards minimal thresholds. Contracts should leave room for negotiation according to individual, national, or cultural values, as long as they express responsibility towards all actors including consumers, suppliers and the resulting children. In regards to surrogacy, living arrangements could be such a topic. It is in the interest of the clinic that surrogates live in better pregnancy-related conditions, and do not have sexual intercourse with their husbands (which might expose them to diseases). The clinics would also receive additional payment for the surrogate's food and accommodation from the intended parents.[145] This solution is not necessarily detrimental to the surrogate either. It may be compatible with the surrogate's interest of minimizing negative stigma in their communities, and they might willingly agree to such terms.[146] Such an arrangement expresses recognition of suppliers' needs and respect for their position. Price is another negotiable

142. *See, e.g.*, Kelley Lee et al., *Bridging the Divide: Global Governance of Trade and Health*, 373 LANCET 416, 420 (2009) (suggesting that budget funds in the WHO should be forthcoming to strengthen the organization's capacity to engage more actively in trade and health issues).

143. INTERNATIONAL HEALTH REGULATIONS, art. 43, WORLD HEALTH ORGANIZATION [WHO] (2005), http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf?ua=1.

144. The WHO Framework Convention on Tobacco Control, June 16, 2003, 2302 U.N.T.S.166. *See* GOSTIN, *supra* note 132, at 296.

145. CENTER FOR SOCIAL RESEARCH, *supra* note 8, at 52.

146. Saravanan, *supra* note 123, at 8 (reporting that some surrogates were happy to stay in the surrogate home and escape daily household chores or domestic problems); SAMA–RESOURCE GROUP FOR WOMEN AND HEALTH, BIRTHING A MARKET: A STUDY ON COMMERCIAL SURROGACY 39, 123 (2012), http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf.

term, though there should be a minimum acceptable threshold. These examples show that the pursuit of personal or national interests is legitimate, but regulated standards similar to fair trade standards of conduct should and could be drafted with regard to the negotiable elements in the transaction. Similar bilateral agreements have begun to do so regarding migrants' rights in response to pressure from advocates and from countries of origin.[147] Analogous pressure could provoke a similar move regarding cross-border reproductive contracts for eggs and surrogacy services.[148]

States should join forces and agree on a minimum threshold of medical, ethical and safety conditions safeguarding the parties' basic rights and provide a framework of negotiation in order to minimize the possibility of exploitation. State intervention represents society's position regarding fair terms and its commitment to allowing transactions to take place only if the results of the transactions are fair.[149] It need not be paternalistic, nor diminish actors' autonomy.[150] Rather, it is justified by the asymmetry in bargaining positions that exists if intervention does not take place.[151] It is questionable whether destination states will actually be willing to engage in international agreements that deprive them of the power they have over "their" women's reproductive capacities. Yet, I believe that in light of the declining control that lower-middle-income countries suffer from in the free market, many destination states will have an interest in collaborating in order to protect the fundamental rights of their women and reclaim their former power over national reproductive capacities. By recognizing that suppliers of reproductive services are the most economically and emotionally vulnerable party to the transaction, states should ensure that the parties' participation in the market is conducted under fair conditions, as is the case with other protective legislation, such as labor legislation, and legislation on behalf of minors and other disadvantaged parties.[152]

147. Jennifer Gordon, *People are Not Bananas: How Immigration Differs from Trade*, 104 NORTHWESTERN UNIV. L REV. 1109, 1127 (2010) (explaining that some agreements inform migrants of their rights, while others include enforcement mechanisms for those rights).

148. *See also* Donchin, *supra* note 86, at 330 (reporting that lately some destination countries that had offered access to foreigners for medical care are considering regulation to reduce access, e.g., Poland and other Eastern European destination countries).

149. WALZER, *supra* note 14, at 60.

150. *See* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139, 141 (1990) (arguing that as long as the state is requested to acknowledge, let alone enforce, surrogacy contracts, one cannot argue that regulating the practice is paternalistic).

151. *See* Dahan, *supra* note 91, at 453.

152. Heather Widdows, *Border Disputes Across Bodies: Exploitation in Trafficking for Prostitution and Egg Sale for Stem Cell Research*, 2 INT'L J. FEMINIST APPROACHES TO BIOETHICS 5, 9 (2009) (discussing the analogy of labor law as justified for state intervention, due to recognition that workers are vulnerable and prone to exploitation. Labor relations are protected by legal restrictions and limitations on working conditions, and involve judicial intervention in settling industrial disputes).

A possible tool could be borrowed from the model of fair trade.[153] The fair trade model aims at achieving better trading conditions for producers of products exported from developing countries, especially the payment of higher prices and higher standards. Coffee bean pickers, surrogates, and egg sellers all operate behind the scenes. The fact that surrogates and egg sellers provide a service rather than sell a product should be irrelevant for the sake of the proposed model. Just as coffee bean pickers should be safeguarded in their work, surrogates should be safeguarded while providing their service. Moreover, if we find it important to protect those who pick our coffee beans, this protection seems all the more necessary when it comes to those who provide the genetic material that conceives future generations, or those who carry the babies to term. Under fair trade principles, there are some sectors in which governments supervise and control the legitimacy of quality criteria for imported products. Take for example the 1993 French establishment of an obligatory government-supervised organic certification scheme.[154] Quality, in this sense, refers not only to safety that safeguards consumers, but also to cultural and ethical qualities, sensitive to both the social and environmental needs of individuals and populations in places of manufacture.[155] Conceptualizing a fair standard model based on the fair trade idea and practice could therefore help ensure ethical standards beyond those inherent in medical safety.

Solidarity-based multilateral agreements and voluntary work by professional organizations have proven successful regarding health worker migrations. One possible model to examine in voluntarily coordinating multinational concerns is the WHO's Global Code of Practice on the International Recruitment of Health Personnel, which was drawn up in order to promote voluntary principles and practices for the ethical international recruitment of health personnel.[156] The code specifically states what constitute responsible recruitment practices, including what to do when recruiting from countries facing a critical shortage of health personnel. It determines, for example, that recruitment should be limited by needs in that person' own health system (art. 4.2). However, once migrant health personnel are recruited, both foreign and domestically trained health workers have equal rights and responsibilities (art. 4.5). A reproductive related code could condemn certain conduct within the industry on

153. For a suggestion of principles of fair trade in surrogacy services, *see, e.g.*, Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEV. WORLD BIOETHICS 111, 116-18 (2009). *See also* Nir Eyal, *Global Health Impact Labels*, *in* GLOBAL JUSTICE IN BIOETHICS 241, sec. 3 (Ezekiel Emanuel & Joseph Millum eds., 2012), http://peh.harvard.edu/events/2013/global_health_footprint/PDF/Eyal_GHILs.pdf (suggesting the creation of a global labeling or accreditation standard that audits facilities and informs medical tourists of how attentive a facility is to healthcare access concerns regarding the local population).

154. Marie-Christine Renard, *Quality Certification, Regulation and Power in Fair Trade*, 21 J. RURAL STUD. 419, 423 (2005).

155. *Id.* at 421; Lee, *supra* note 142, at 420.

156. WHO, WHO GLOB. CODE OF PRACTICE ON THE INT'L RECRUITMENT OF HEALTH PERSONNEL, May 21, 2010, http://www.who.int/hrh/migration/code/WHO_global_code_of_practice_EN.pdf.

the one hand, but also support an information exchange system and establish a network of national authorities to encourage other conduct on the other.[157]

Contextualization requires interaction between society and political institutions. States have a particular stake in the subject—whether it is a consumer's state, a surrogate state, an egg-donor state, or a combination thereof. States should be actively involved in designing international norms and should be allowed to voice concerns and reservations throughout the process. There should be an option of using input from states in the international political structure through activities such as public workshops and public debates. It has been suggested, for example, that in order to shape and manage trade policies that affect health, the WHO should work with ministries of labor, education, finance, foreign affairs, trade and commerce to provide training on the health-related implications of trade agreements, and improve everybody's knowledge and capacity to operate within their states.[158]

According to the shared responsibility model, individuals must also follow through and fulfill their duties. Since reproductive services constitute a private industry, negotiable terms are the major area where individuals have the authority as well as the capacity to act. Regarding negotiable terms, specific individuals' duties may be relatively narrow and include mainly the duty to design the terms of their specific transaction, and to ensure a fair distribution of benefits. As private consumers, individuals have a power to influence the market and not include unjust contractual clauses in contracts they are parties to. They can use their economic muscle to demand fair contractual terms and raise awareness of injustice, when necessary. Even strong actors have an incentive to take part in a just practice, and most would consciously choose not to exploit others if they had enough awareness: parents want to be able to tell the resulting children about the process with pride. Nevertheless, creating a beneficial structure would mean changing the status quo.[159]

Young believed that external pressure could be sufficient to drive powerful actors (such as consumers) into action to change unjust situations.[160] Young used the sweatshop example (consumers would not like to buy something produced in a sweatshop, thus manufacturers are pressured to act justly), and many other fair-trade activists also deploy this argu-

157. *Id.* art. 7.

158. WHO, EVERYBODY'S BUSINESS, STRENGTHENING HEALTH SYSTEMS TO IMPROVE HEALTH OUTCOMES – WHO'S FRAMEWORK FOR ACTION 10, 17, 23, 32 (2007), http://www.who.int/healthsystems/strategy/everybodys_business.pdf. On the importance of improving coherence across different sectors through, for example, interministerial committees, *see* Lee et al., *supra* note 142, at 421.

159. A.J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFF. 176, 192 (2006) (recognizing that the richest people in the world might oppose his theory since they have too much to lose).

160. Young, *supra* note 12, at 127. *See also* Renard, *supra* note 154, at 423 (arguing that consumers will be willing to pay more for ethical manufacturing if they are guaranteed that the price premium will actually reach producers).

ment. There are reasons to be skeptical of Young's assumption that beneficiaries of an unjust process would voluntarily adapt to changed circumstances, at least in the case of infertility. People may not buy coffee picked under exploitative terms and settle for the second-best choice of coffee, but not being able to have children without surrogacy is a heavier burden. Moreover, if reproductive transactions were subject to fair trade principles, the price would increase for these types of transactions, leaving surrogacy an unaffordable option for many. Nevertheless, this is a pessimistic view, at least in the sense of consumers' willingness to participate in ethical transactions. For example, there is an Israeli initiative called "Responsible Surrogacy" (2014) that is meant to expose potential consumers of cross-border surrogacy to information about the ethical aspects of the procedure, with the hope that it will drive consumers to demand agreements that incorporate these considerations.[161] The motivation for this project stems from an understanding that the moral responsibility lies with the intended parents, and that their stand may lead to changes in the procedure in favor of all involved. This initiative is a good example of how individual duties might be incorporated into a beneficial cross-border reproductive model.

c. Monitoring

A framework for fair transactions raises a need for international regulation of individuals' relations within the global market. Some trade-related cooperation would have to take place. Under the current international order it is unclear which institutions should be assigned the authority to monitor cross-border transactions and suggest adaptations. Since cross-border reproductive transactions involve medical procedures, economic transactions, and women's bodily services, collaboration between women's organizations (such as UN Women), the WTO or the World Bank, and the WHO seems likely possibilities. These organizations could offer necessary points of connection between trade and health in general, as well as reproductive services in particular.[162] Regulating health-related trade probably exceeds the current mandate of the WHO, which is the prevention of disease migration.[163] The roles of the World Bank and WTO also do not necessarily cover all these rights.[164] Neverthe-

161. *See generally* PUNDEKAUT ACHRAIT [RESPONSIBLE SURROGACY], http://www.r-surrogacy.org/ (last visited July 20, 2014). A website that discusses many areas in which ethical problems may taint the contract making it undesirable for the surrogate in order to raise the consciousness of, as well as market pressure on, potential consumers.

162. *See, e.g.*, THE CENTER FOR POLICY ANALYSIS ON TRADE AND HEALTH, http://www.cpath.org (last visited Oct. 19, 2015) (publishing a list on globalization and health, and posting brief descriptions and contact information for additional key organizations attempting to address the public health effects of global trade).

163. Cohen, *Medical Tourism and Global Justice*, *supra* note 49, at 50-51.

164. *International Bank for Reconstruction and Development Articles of Agreement*, WORLD BANK, art. IV, sec. 10 (Feb. 16, 1989), http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049603~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708~isCURL:Y,00.html (stating that political affairs fall outside the

less, these institutions are concerned with capacity building within countries, and this foundation can be used as a common framework for collaboration.[165] The functions of WHO and UN Women fit more naturally with the issues that lie at the heart of cross-border reproductive markets. Both are committed to monitoring wider systematic progress, and their goals and functions may justify intervention in regulating and monitoring cross-border reproductive transactions.[166] Moreover, extensive intervention by these two organizations, rather than the WTO or the World Bank, may prevent further commercialization of surrogacy and better express the relationships and contextual needs behind markets in women's bodily services.

Monitoring the market effectively requires international as well as national cooperation. If we want all actors to equitably enjoy the opportunities that the market has to offer, coordination between international institutions and national bodies is needed. International institutions, for example, have important roles to play in supporting governmental actions: UN Women must support intergovernmental bodies in their formulation of policies, global standards and norms, help member states implement these standards, and stand ready to provide suitable technical and financial support to those countries that request it. UN Women could also advise states on how to forge effective partnerships with civil society.[167] The WHO similarly could help states in strengthening health services by aiding in the establishment and maintenance of effective collaboration with the United Nations, specialized agencies, governmental health administra-

realm of factors that the World Bank and its officers are authorized to consider). *See* Chapman, *supra* note 127, at 107-08 (arguing that there is no basis in international law for arguing that human rights promotion is within the mandate of the World Bank and the WTO).

165. *See* Procedural Decisions of the Committee on Economic, Social and Cultural Rights, Decisions adopted by the Committee at its eighteenth session, U.N. DOC. E/1999/22, para. 515(7) (1998) ("Effective social monitoring should be an integral part of the enhanced financial surveillance and monitoring policies accompanying loans and credits for adjustment purposes. Similarly the World Trade Organization (WTO) should devise appropriate methods to facilitate more systematic consideration of the impact upon human rights of particular trade and investment policies."). *See also Building Trade Capacities*, WTO, http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm (last seen Nov. 16, 2013); *Trade and Health*, WHO, http://www.who.int/trade/resource/tradewp/en/ (last visited Nov. 16, 2013); *Advancing Gender Equality: Promising Practices*, UN WOMEN, http://www.unwomen.org/mdgf/overview.html (last seen July 20, 2014).

166. WHO, *The Constitution of the World Health Organization* art. 2(i)(k)(q)(r) (July 22, 1946), http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1 [hereinafter *Constitution of the World Health Organization*] (duty with regard to international and public health-related issues, for example: to propose conventions, agreements and regulations, and make recommendations with respect to international health matters, and specifically, to promote maternal and child health and welfare; to provide information, counsel and assistance in the field of health; to assist in developing an informed public opinion among all peoples on matters of health.); *About Unwomen*, UN WOMEN, http://www.unwomen.org/en/about-us/about-un-women (last visited July 20, 2014) [hereinafter *About Unwomen*, UNWOMEN] ("to hold the UN system accountable for its own commitments on gender equality, including regular monitoring of system-wide progress.").

167. *About Unwomen*, UN WOMEN, *supra* note 166.

tions, professional groups and other organizations.[168] The WHO can use its capacity to collect data from member states as part of its country analysis to provide consistent, comparable information about cross-border reproductive transactions and their effect on women suppliers' health. This data could help to measure whether each actor maximizes the likelihood that his duties will be successful.[169]

Ensuring fair terms for reproductive services could be aided by international institutions, but cannot be achieved without parallel enforcement by states. The burden of ensuring that cross-border transactions do not exploit suppliers' poverty should lie on consumers, but the obligation to demand and monitor fair terms in these transactions is an obligation of the state.[170] Consumers' states could revise contracts to make sure that they comply with standard safeguards, as done domestically, for example, in Australia (VIC, WA and, by practice rather than legislation, ACT), Greece, Israel, and South Africa, which mandate that contracts be vetted for ethical approval.[171] Today some countries review contracts retrospectively, as part of the process of granting legal parenthood or nationality (for example, Brazil, Mexico, and Holland).[172] However, a procedure that revises the contracts *ex ante* could better ensure just terms than procedures that only begin after a child is already involved. Otherwise, the state will find itself confronted with children resulting from undesirable surrogacy procedures but unable to do anything to minimize the damage.

Regulating a framework for reproductive services based on fair terms would probably be more attractive to consumers' states that accept some sort of commercialization of reproductive services, even with restrictions. Politically, it may be hard for countries that completely ban the supply of reproductive services to regulate a market that they consider intrinsically unethical or wrong.[173] However, due to the fact that even states that completely condemn surrogacy acknowledge the resulting children due to the implications that such trade has for children's rights, these duties should not be voluntary. As long as its citizens are involved in cross-border reproductive markets, whether states like it or not, they become actors in the process and should bear a duty to promote ethical transactions. Therefore, every state, no matter what national policy it holds, should be accountable for ensuring fair cross-border reproductive transactions.[174]

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168. *Constitution of the World Health Organization*, *supra* note 166, at arts. 2(b)(c).

169. On the collection of information (e.g., statistics and standards), see, *e.g.*, *Hague Convention on the Protection of Children*, *supra* note 114, art. 7.

170. For the Spanish case, *see* Storrow, *supra* note 26, at 544.

171. PERMANENT BUREAU, *supra* note 53, at n. 63.

172. *Mexico*, *in* INT'L SURROGACY ARRANGEMENTS, *supra* note 10, at 271; *Holland*, at 287.

173. Tobin, *supra* note 4, at 344.

174. Humbyrd, *supra* note 153, at 116 (arguing that a framework for ethical surrogacy arrangement should be mandatory rather than optional).

4. The Israeli Example

Israel was the first country to legislate surrogacy and one of the first countries to urge the international community to develop a multilateral response to the disharmonized regulation between different jurisdictions.[175] A draft bill submitted in 2014 in Israel would amend the law in a noteworthy attempt to confront the difficulties stemming from cross-border surrogacy transactions.[176] Many principles mentioned in this paper are reflected and implemented in this proposal. Article one reflects the need for consistency, as it applies the law to any surrogacy arrangement for Israeli citizens, carried out in Israel or elsewhere. Articles two and seven specify minimal medical standards (limitations on the number of transactions each surrogate can take part in and on the number of implantation cycles that can be carried out). Article six recommends separation of the medical staff between the intended mother and the surrogate. It is meant to ensure that the surrogate's best interests are the sole consideration for her medical staff and that the professional staff does not suffer from a conflict of interest.

The bill does not ban cross-border transactions from taking place (maybe acknowledging that the state will not be able to enforce any ban), but it reflects the principle of proportionality, by equalizing the eligibility of all citizens for domestic surrogacy on the one hand, and enlarging the national pool of potential surrogates to include married women as potential surrogates in addition to single women on the other. As a consequence, cross-border transactions will probably not be abolished, but it will hopefully reduce the number of cross-border transactions in favor of a safer domestic procedure, subject to Israeli monitoring and standard setting.

Nevertheless, the bill misses some key regulations of domestic surrogacy that should be taken into consideration. In an ethical contract, the surrogate should be recognized and her agency respected in the decision-making regarding her body. Currently the rights of the surrogate to choose her physician, to make decisions about her body, or to terminate the pregnancy, are not specifically stated. An embryo, or a fetus, albeit not made from the gametes of the supplier, is nonetheless connected to her body, to which she has the only right. This balance should be kept even within a surrogacy transaction. Suppliers should be free to change their mind about bearing a child and still be paid for their effort until that point, without being considered liable for breaking the contract.[177] The bill also did not note the possibility of a future relationship between the surrogate and the resulting child. Neither surrogate nor child had an enumerated right to get

175. Baker, *supra* note 115, at 412.

176. Draft Bill Amending the Law of Agreements to Carry Embryos (No. 2), 2014, HH 916 (Isr.).

177. Humbyrd, *supra* note 153, at 117 (recommending that payment must be independent of pregnancy outcome, such as miscarriage, voluntary abortion, stillbirth or disabled child).

information about the other (similar to some adoption arrangements). Additionally, the draft bill limited the amounts that surrogates could charge, while letting physicians, clinics, and mediators to negotiate payments without constraint. Only the opportunity of the surrogate, the weakest actor, is limited. If the rationale behind this bill is not to expose women to exploitation, it would be better to remove the financial incentives of mediators, and to set a minimal threshold on the payment made to surrogates, above which they could attempt to further negotiate.[178] Another problem is that the draft bill does not appoint any national monitoring body to ensure that the procedure is conducted properly, whether generally or in regards to mediators.

A specific subsection in the draft bill relates to cross-border transactions and expresses a certain commitment to critical aspects of justice. First, articles 17H-I discusses few mandatory terms of the contract, including demanding that the surrogate sign the contract before the first treatment, that information regarding the meaning and consequences of the treatment be given to her and that she freely consent to the procedure. The contract should protect the rights of the foreign surrogate regarding her ability to terminate her pregnancy. Additionally, the contract should not contradict the law in the destination country (including legal eligibility of foreigners for domestic surrogacy services and the demand that domestic laws in destination states acknowledge the child as the consumer's child). The surrogate should get a copy of the contract. Consumers should be obligated to take the resulting child regardless of circumstances and not be able to reject it (due to abnormalities or disabilities, for example). The draft bill also states that statistical information regarding the number of applications and actual procedures carried out should be transparent and available to the public. Although Israel may not be able to ensure the extraction and enforceability of all these demands, there is moral value in its attempt to revise them: the bill reflects a serious intent to confront the challenges posed by cross-border transactions.

Several important issues are insufficiently addressed in the bill or missing completely. The draft bill avoids mentioning preliminary medical criteria for choosing foreigner surrogates, as it does for Israeli surrogates and does not address possible responses to illegal procedures other than criminalization of all involved. It leaves many questions unanswered, for example: which authority should be responsible for the child if the intended parents are penalized and put in jail? Another issue to consider is that administratively, in order to ensure the child could get certain information regarding the surrogate according to his/her right, a registry of all actors (suppliers, consumers and mediators) should be kept. I also suggest

178. It is hard to determine what is considered a fair price. A minimum price might reduce exploitive conditions towards the supplier by giving them better payment for their work. However, it might raise objections on the part of infertile patients incapable of paying higher amounts. These people would not be able to recourse to the market to fulfill their right to reproduce. A possible suggestion may be to set a minimum price, or to determine that suppliers get no less than 50% of the value of the transaction.

that the foreign surrogate be informed of her right to file a mistreatment complaint at the Israeli embassy.

This section has presented a case study that demonstrates what a just structure for cross-border reproductive transactions might look like. Nevertheless, the bill still reflects the existing power imbalance, as it fails to abolish the commercial incentives of mediators who profit from impoverished women providing their wombs. To rectify this, the draft bill proposes that mediators and agencies involved in cross-border reproductive transactions be accredited. Although accreditation is quite common, it is not the best way to address the role of mediators. Former experience shows that the licensing of certain mediators assigns great power to private entities and may involve corruption or give commercial benefits to the few, chosen agencies. There is no justification for further commercialization of the procedure by promoting the financial interests of mediators. The 1993 Hague Convention on Adoption may be a useful model to consider for dealing with mediators. The most significant improvement the Hague Convention on Adoption suggested regarding international adoption was to administratively control mediators and replace for-profit entities with non-profit ones.[179] Mediation of reproductive transactions should be carried out by state institutions or by non-profit NGOs, similar to those who regulate and oversee adoption in Israel.[180] Ethical guidelines and monitoring mechanisms for such organizations should be clearly drafted.

The draft bill demonstrates that Israel is aware of its responsibility towards its citizens and towards foreigners who might be affected by this reproductive policy. It tries to ensure that cross-border transactions will be monitored, inasmuch as a unilateral action can ensure monitoring, as well as ensure equal rights of foreign and domestic surrogates when transacting with Israeli consumers.

However, the reality is that the ability of the proposed bill to abolish exploitative transactions is dubious. The enforceability of the criminal offenses will not necessarily reduce exploitative transactions, for example, in the case of mediators or physicians who are not Israeli. Also, it is hard for a state to exercise extraterritorial authority over its citizens when they privately engage in transactions that are legal where they are carried out.[181] In the absence of justification for using the legal tool of extraterritorial offenses only domestically related elements could be criminalized. On the assumption that the basic conditions of supply and demand remain un-

179. On safeguarding against abuse by intermediaries in the Hague convention, *see* Baker, *supra* note 115, at 422-25.

180. Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, Directive 2004/23/EC (urging Member States to take steps to encourage a strong public and non-profit sector involvement in the provision of tissue and cell application services and the related research and development). *But see* Cohen, *How to Regulate Medical Tourism*, *supra* note 46, at 15 (suggesting that the reviewing bodies should be third parties and not the government itself).

181. *See supra*, sec. I.1.

changed, even if this bill was passed, bargaining power between the parties would stay about the same, and future contracts would reflect that imbalance, to some extent. The next section notes that any truly comprehensive regulation must address the wider aspect of background inequality and focus on the unequal opportunities and poverty that incentivize women to enter into reproductive services transactions in the first place.

5. Wider Requirements

The current unjust system is the result of various social, political, and legal circumstances in destination countries. There is a correlation between poverty, social vulnerability, and the absorption of contractual and health risks. In a country like India, for example, which lacks social safety nets, and where the governance structure is attuned only to the needs of the rich and powerful sectors of the society, poor unskilled women's salaries hardly covers basic needs, such as housing, medical treatment, and education of their children.[182] This means that these women need to pursue private options to get them. Lack of social support (such as welfare) in destination states creates poverty and economic vulnerabilities such that the poor are afraid to refuse or renegotiate transactions, even though theoretically these contracts are open to negotiation.[183]

Fair distribution of the benefits from a reproductive transaction would not necessarily be sufficient to take people out of the poverty cycle, and could not compensate for the lack of education, health insurance or housing that cause women to enter surrogacy transactions in the first place.[184] It would not change the ambitions and aspirations of the poor to earn money any way they can in order to receive equal recognition. As long as these conditions endure, poor people will remain oriented towards transactions that do not truly improve their conditions. Since the main motivator of this type of market is that impoverished individuals have insufficient alternatives on how to earn money, it is clear that fighting poverty should be part of the solution of bringing negotiation parity to contracts.

The fight for a reduction in economic disparities is a wider problem, not specifically related to cross-border reproductive transactions. It is one of the main concerns of the global justice literature, and clearly a wider issue than the issues this paper can address. While contract rules and safe medical care may be dealt with through regulation, the problem of poverty is unlikely to be cured by regulation alone. I do not pretend that a regula-

182. CENTER FOR SOCIAL RESEARCH, *supra* note 8, at 32.

183. Onora O'Neill, *Justice, Gender and International Boundaries*, 20 BRITISH J. POL. SCI. 439, 457 (1990).

184. *Id*. at 456 (arguing that by idealizing capacities and independence of parties involved in market transactions, liberalism overlooks power asymmetry and obscures why the weak may be unable to dissent to arrangements proposed by the strong); *How to Regulate Medical Tourism*, *supra* note 46, at 30 (arguing that we should think not only about remedial measures, but also about how the injustice of the global order might be diminished through institutional reforms).

tive model of cross-border reproductive transactions can indirectly achieve this goal. However, it could, and should, be considered when applying the shared responsibility model on any practice that is so closely correlated with poverty. Miller mentions two preliminary conditions that states must ensure:[185] first, all participants of the market system must enter it with some degree of freedom. Second, states should accept terms of trade only when it benefits their citizens.

Citizens should be able to participate as market agents free from the influence of poverty, hunger, illiteracy, or morbidity.[186] These types of vulnerabilities are partially socially constructed. Comprehensive human development involves the economic, educational, social, cultural, and political development of the individual, family, and community in order to empower those populations.[187] Social exclusion and inequality cannot be rectified unless society changes its norms and expectations towards the poor. National political structures therefore must be assigned a duty to improve the social/political/economic conditions necessary in order to promote self-actualization of their citizens.[188] This argument assigns responsibility to the governments of destination countries to improve capabilities, and holds them accountable for poverty.[189]

Suppliers should not enter reproductive transactions out of economic deprivation or despair. Autonomy requires a set of possible options for poor women to choose from, without compromising their own health and wellbeing. They should have different alternatives to earn money in case they do not want to offer reproductive services. States should provide safety nets of substantive needs to its poor, invest resources, enact laws, and develop infrastructure, institutions, and policies for this purpose.[190] If people must earn money, states should strive toward changing the social division of labor in order to change the bias of the structure itself. Society should consider "the right to a basic income" as a social good that should be equally available to all. The least a state should do is secure basic rights and conditions of livelihood of citizens who cannot earn an income in traditional labor markets. If the state provided safety nets, suppliers could be free to decide not to enter exploitative transactions. In these circum-

185. Miller, *supra* note 97, at 396-97.

186. *See* SATZ, *supra* note 13, at 27; Naomi Pfeffer, *Eggs-Ploiting Women: A Critical Feminist Analysis of the Different Principles in Transplant and Fertility Tourism*, 23 REPROD. BIOMED. ONLINE 634, 639 (2011).

187. NUSSBAUM, CREATING CAPABILITIES, *supra* note 74, at 21.

188. *Id.* at 113 (arguing that each nation should provide support of the central capabilities of all citizens).

189. For an overview of the capabilities approach, *see generally supra* note 74; 4–11 (2001); 39–53 (1992); 231-35 (2009). For differences between Nussbaum's and Sen's versions, *see supra* note 74, at 19-20. For capabilities across national boundaries, *see supra* note 138, at 273–315.

190. WALZER, *supra* note 14, at 180. *Cf. id.* at 56-57 (claiming regarding guest workers that in a constrained labor market (where unions and the welfare state protect the worker) the wages and working conditions of the undesirable jobs might improve radically, which might raise the costs of transaction and challenge the existing social hierarchy).

stances any choice could be respected, including the choice to transact their reproductive capacity, as long as the terms are fair. State accountability grows when it provides health services to foreign consumers in a way that might come at the expense of its own citizens' access to health care (especially if these citizens normally do not have access to these services). The failure to assign this responsibility lets states ignore the importance of background conditions in cases of exploitation and contributes to the social acceptance of transactions based on such inequality, both in poor and in affluent countries. It might also normalize more subtle exploitations of those who are economically vulnerable.

Consumers' countries might be more remotely connected to structural inequality and the implementation of international norms in suppliers' countries, which are extant regardless of cross-border reproductive transactions. They might have no direct connection to the surrogates' state's poverty, gender, or class inequality. Class inequality itself, after all, exists independently of participation in cross-border reproductive transactions. Inequalities that we see today derive from external factors such as status hierarchies, organizational structures and power relationships. This truth enables consumers' states to renounce responsibility in regards to foreign suppliers of reproductive services and point a finger instead at governments in destination countries, where the transactions occur and where the suppliers offer their services. Yet affluent countries bear responsibility as well.[191] Their citizens depend on and benefit by transactions that stem from these inequalities, making them indirectly connected actors.[192]

Consumer states must therefore play their part in creating international institutional infrastructure. Today, any negotiation to determine de-

191. For excessive poverty as the responsibility of the politically and economically influential states, *see, e.g.*, NUSSBAUM, CREATING CAPABILITIES, *supra* note 74, at 42; NUSSBAUM, FRONTIERS OF JUSTICE *supra* note 138, at 316; Thomas W. Pogge, *Moral Universalism and Global Economic Justice*, 1 POL. PHIL. & ECON. 29, 44 (2002). For the basis of such a duty, *see* Benvenisti, *supra* note 16, at 308 (basing the duties on trusteeship for promoting the rights of all human beings and their interest in sustainable utilization of global resources); NUSSBAUM, FRONTIERS OF JUSTICE *supra* note 138, at 115 (basing responsibility on past colonialism); Thomas W. Pogge, *Eradicating Systemic Poverty: Brief for a Global Resources Dividend*, 2 J. HUM. DEV. 59, 73 (2001) (basing duty on the interests of affluent states to efficiently avoid externalities of poverty in advance rather than in retrospect. Pogge argues that cross-border externalities and risks will become a two-way street because no state will be able to effectively insulate itself. Poverty will cause military and terrorist attacks, illegal immigration, epidemics and the drug trade, pollution and climate change. I don't see these externalities as relevant in the specific case of cross-border reproductive transactions.); Interim Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, *To the United Nations General Assembly*, UN DOC. A/58/427, para. 32. (Oct. 10, 2003) (by Paul Hunt), para. 32 (basing the responsibility to work actively toward equitable multilateral trading, investment, and financial systems conducive to the reduction and elimination of poverty on article 2 of the International Covenant on Economic, Social and Cultural Rights).

192. The fact that the destination country can alleviate the harms caused by cross-border reproductive care but fails to do so ought not to prevent consumers' countries and international institutions from fulfilling their global justice commitment. *Supra* II.1.a, the accountability principle.

sirable international trade norms is, in itself, subject to inequalities and power imbalances among states. Critics challenge the norms adopted by international institutions as serving the dominant groups in society, and denying equal economic benefits to others.[193] Consumers' countries through international institutions should redesign the global sphere in a way that enables all actors to enjoy cross-border transactions fairly under safe standards. Actors should either develop new procedural tools (institutions and rules) or strengthen existing ones in order to conceptualize cultural recognition and social equality through empowerment, solidarity and support, regardless of low status or political powerlessness.[194]

A state's international responsibilities for shaping global social arrangements should be commensurate with its position in decision-making procedures and intergovernmental bargaining. This proportional conception of responsibility imposes a greater burden on affluent countries. These states are in a stronger position to influence the international order and are dominant decision-makers in international institutions. Consumers' states should therefore bear greater responsibility for improving procedural international rules. A shared responsibility model thus answers the demands for justifying external duties incumbent upon richer states and other institutions.[195]

The development of mechanisms for institutional international considerations exceeds the scope of this paper, but in general, improving representation should express recognition of individual members within society are full partners in political agency. Global trade regulations should be sensitive to social needs, even at the expense of economic values.[196] For example, I recommend procedural and substantive engagement of concerned individuals as part of a more contextualized rulemaking process. Alternative mechanisms for the representation of all actors in international decision-making, not exclusively through the sovereignty of the state but through, for example, NGO's,[197] could improve the interaction

193. Lee, *supra* note 142, at 417 (arguing that the priorities of countries with the greatest resources remain dominant).

194. WALZER, *supra* note 14, at 118 (stating this requirement in order to reach complex equality).

195. It can be attributed to the TWAIL perspective. *See* Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INT'L COMMUNITY L. REV. 379, 383 (2008) ("the utility in TWAIL analysis is its ability to show how the activities in one part of the world can have detrimental effects in other parts of the world (the Third World especially), and hence, could equip scholars with justifications for extraterritorial obligations from richer states.").

196. *See* Ronald Labonte, *Globalization, Health, and the Free Trade Regime: Assessing the links*, 3 GLOBAL DEVELOPMENT & TECH. 47, 66 (2004) (arguing that the WTO, as an institution, should be judged for how it contributes to the accomplishment of basic rights, human development, health and environmental sustainability goals, rather than simply on the degree to which it succeeds in promoting trade and investment liberalization. Changes should be made in WTO agreements when they conflict in any way with the accomplishment of these and other important norms and goals.).

197. *See* B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, ECON. & POL. WKLY. 337, 344 (1999) (criticizing the absence of non-state bodies as well, such

between society and the political institutions which make the rules, and ensure that they take the effect on others into consideration.[198] If international rules acknowledge the needs of women in poor populations (potential suppliers) to be able to provide for their families, it could have the potential to result in norms that increase women's bargaining power. It could change, for example, the priority that international regulation awards to trade interests over social considerations.

It has been suggested that a locally rooted, bottom-up model could create networks of stakeholders and join them together in an organization that efficiently conveys information through social networks and ensures decent conditions.[199] Such a network could represent suppliers' interests. In order to truly serve the interest of all groups, coalitions should be aware of similarities as well as disparities between collaborating populations and between the causes chosen.[200] Not all feminist-motivated struggles would advance the protection of surrogates, and the same could be said about other activism, such as labor-oriented struggles. It is also important to note that the use of suppliers for such purposes is not exploitative in itself, but promoting, for example, the interests of people who profit from their services, such as clinics and mediators who supposedly speak in their name, could be. The tools for implementation of these mechanisms are left for future research.

It is important to clarify that even if all of the above-mentioned suggestions are implemented, this does not mean that inequalities will cease to exist. It is, however, an approach that insists on at least a minimal realization of equality.

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as interest groups and civic organizations, that would represent the impoverished classes). *But see* Sangeeta Kamat, *The Privatization of Public Interest: Theorizing NGO Discourse in a Neo-liberal Era*, 11 REV. INT'L POL. ECON. 155, 161 (2004) (arguing that the influence that advocacy NGOs have in international policy forums can be seen to undermine the sovereignty of state and international institutions).

198. Cohen, *How to Regulate Medical Tourism*, *supra* note 46, at 11 (calling for representation of the affected population as part of the process of decision-making). *See, e.g.* Chimni, *supra* note 108, at 13 (suggesting representation of subaltern classes in negotiation teams by states); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147, 170 (2006) (suggesting an inclusion of the informal sector in the ILO decisions).

199. Rittich, *supra* note 111, at 218-19.

200. Whittaker, *supra* note 10, at 113 (suggesting that international umbrella organizations for patients, such as International Consumer Support for Infertility (iCSi), could present patients' perspectives and influence legislation and guidelines on assisted reproduction services transnationally). On the logics of transnational collaboration, *see* Vera Mackie, *The Language of Globalization, Transnationality and Feminism*, 3 INT'L FEMINIST J. POL. 180, 194 (2001). For examples of different coalitions and networks that have expressed concern about the impact of global trade on health services and democracy, and succeeded in preventing decisions regarding privatization, *see* Ellen R. Shaffer et al., *Global Trade and Public Health*, 95 AM. J. PUB. HEALTH, 23, 32 (2005).

Conclusion

Unilateral action is insufficient to achieve the necessary comprehensive ethical regulation of cross-border reproductive transactions. I have suggested a shared responsibility model as an alternative theoretical foundation for assigning duties between actors in this system. My goal was not to abolish these markets, based on the understanding that for practical reasons it would be better to accept a certain form of the market. Rather, the model considers a more proportional solution, instead of a solution that decreases the autonomy of suppliers or limits their opportunity to profit from such transactions. This is a liberal solution, one that aims to empower all participants.

The shared responsibility model reflects different voices and challenges the scope of legal responsibilities, the structure of social institutions and the norms they create. Attention is paid to whether and how social factors contribute to the incidence of injustice, in order to distinguish the different degrees of responsibility of all actors. The model deconstructs the selective accountability of strong actors and the power concentrated in their hands and does not dismiss the role indirect actors play. It makes it possible to assign greater responsibility to those who contribute more to the unjust situation through direct causal connections, based on empirical investigations of actions and interactions within the practice and their promotion of unjust results. The obligation has to grow stronger due to the asymmetric power relations between the parties to the transaction.

I have offered four parallel fields where I believe action is needed: joint action regarding legal parenthood and the nationality of the child; the professional field, to ensure universal, proper medical standards; the contractual field, to avoid violating women and children's rights, as well as a fair trade model to better divide the benefits of transactions; and, lastly, a general global commitment to impoverished populations. Every relevant feature of cross-border reproductive services is examined and responsibility is assigned accordingly: the meaning of parenthood, the psychological implications of infertility, existing opportunities for infertile individuals, background conditions of suppliers, the role of agents, the implications of reproductive services for suppliers in the context of their life conditions and legal infrastructure such as the reproductive health policies that regulate assisted reproduction, and private trade law. Examining specific areas of action emphasizes the commonalities among actors, while, at the same time, leaving states entirely free to regulate or restrict cross-border reproductive transactions in whatever way they deem fit, as long as they respect these universal minimum safeguards. Duties exist in the realm of reproductive services, whether we categorize transactions as belonging to the private family sphere or the public market sphere, whether we recognize a basic global institutional structure, and whether violations of suppliers' rights qualify as severe human rights violations. These flexibilities make this model a good option to consider.